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No. (1)

Supreme Court, U.S.
FILED
07-731 SEP 26 2007
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In The

# Supreme Court of The United States

PETER J. CORINES,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

*Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit*

## PETITION

**PETER CORINES**
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## QUESTIONS PRESENTED FOR REVIEW

1- Did the United States Court of Appeals for the Second Circuit err in denying Petitioner's request for a Certificate of Appealability (COA)?

2- Did the District Court err in dismissing Petitioner's motion for relief of conviction under 28 USC 2255 without an evidentiary hearing?

3- Does the decision of the Court of Appeals conflict with prior orders of the circuit and those of other circuits?

4- Did Petitioner present a substantial showing of the denial of a constitutional right?

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## CITATION OF OFFICIAL REPORTS

Peter Corines v. United States of America, 07-0711-pr, S.D.N.Y., NYC, 06-CV-10219, 02-CR-0021, Daniels, J., United States Court of Appeals for the Second Circuit (June 28, 2007). **(1a).**

## STATEMENT OF JURISDICTION

This Court has jurisdiction to review the order of the United States Court of Appeals pursuant to 28 U.S.C. Sect.1254(1).

## BACKGROUND OF THE CASE

Petitioner was adjudicated guilty after pleading guilty to one count of 18 U.S.C. 371, Conspiracy to Commit Health Care Fraud and Make False Statements Relating to Health Care Fraud, and one count of Mail Fraud, 18 U.S.C.1341 and 1342. **(60a)**[1]. The indictment alleged these offenses, respectively, as Counts One and Six[2]. The Plea proceeding took place on December 2, 2003, after opening statements on December 1, 2003, the first day of trial.

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[1] Numbers in parentheses with suffix "a" refer to pages in appendix, herewith attached.

[2] Prior to trial, the Court severed Counts 1-3 of the Indictment from Counts 4 through 11. The Government chose to proceed to trial on the latter counts, which were the charges of Mail Fraud.

On March 29, 2004, prior to sentencing, petitioner moved with new counsel, to withdraw his guilty plea. The District Court abruptly denied the motion prior to the expiration of the time limit for defendant to file a reply brief.

Petitioner was sentenced to 18 months incarceration, and three years supervised release. Criminal monetary penalties of $200.00 assessment and restitution of $70,000.00 were also imposed.

Petitioner moved for bail pending appeal which was denied. He surrendered and began serving his sentence on September 15, 2004. The U.S. Court of Appeals for the Second Circuit dismissed his direct appeal on September 16, 2005. **(62a).**

Petition for a writ of certiorari was filed on March 24, 2006 and placed on the docket of the Supreme Court as No. 05-10038. The petition was denied on April 24, 2006. Petition for rehearing was denied on June 19, 2006. Peter Corines v. United States, No. 05-10038.

Petitioner served his sentence and now remains on supervised release.

On October 26, 2006 Petitioner filed a **Motion to Vacate, Set Aside or Correct Sentence under 28 U.S.C. sect. 2255. (53a-56a).** Petitioner raised several issues of constitutional import. The Court then scheduled a pro se pretrial conference, assigned the matter to Magistrate Judge James C. Francis, and issued a civil case management plan and scheduling order. **(45a-51a).** Two weeks before the scheduled conference date, the Court issued an Order, denying petitioner's 2255 Motion. **(57-a).**

Petitioner filed a Motion for Reargument and Reconsideration (**37a-51a**). This motion was denied (**52a**).

In accordance with 28 U.S.C. 2253, petitioner then moved, in the United States Court of Appeals for the Second Circuit, for a Certificate of Appealability or "COA" **(2a).** The Court denied the motion and dismissed the appeal, stating:

"...Appellant has not made a "substantial showing of the denial of a constitutional right." Peter Corines v. U.S. 07-0711-pr (2d Cir.2007), 06-cv-10219, 02-cr-0021, Daniels, J. (S.D.N.Y.). **(1a).**

Petitioner now petitions this Court for a Writ of Certiorari.

## STATEMENT OF THE CASE

This petition seeks review of the decision of The United States Court of Appeals for the Second Circuit denying a Certificate of Appealability and dismissing the appeal because the Appellant has not made a "substantial showing of the denial of a constitutional right."28 U.S.C.sect.2253(c), and Miller-El v. Cockrell, 537 U.S. 322 (2003). **(1a).**

Appeal to the U.S. Court of Appeals for the Second Circuit was filed after issuance of the order of the United States District Court for the Southern District of New York, Daniels, J., summarily dismissing Petitioner's Motion under 28 U.S.C. 2255. **(57a-59a).** After initially scheduling a hearing and ostensibly notifying the U.S. Attorney, (**45a-51a**), the Court abruptly issued its order denying the motion without evidentiary hearing, and held that, "despite a liberal reading of the pleadings, the

petition could not survive preliminary review for facial validity".

The Court, without hearing argument on the matter, then proceeded to dismiss the petition and also concluded **(58a, fn 2)**:

> "Petitioner's new claim of ineffective assistance of counsel is clearly without substantive merit. Petitioner cannot demonstrate that (1) his counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and (2) that he was prejudiced by his attorney's errors, i.e. that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," United States v. Eyman 313 F.3d 741, 743 (2d Cir. 2002 (following Strickland v. Washington, 466 U.S. 668 (1984)(internal quotations omitted).

Concurrently, the district court also denied a Certificate of Appealability (COA), and stated that: "any appeal from this Order would not be taken in good faith." **(59a)**. By these orders, the District Court and the Court of Appeals deprived petitioner of any hearing of the issues raised in his motion. Petitioner's briefs, however, demonstrate several issues of constitutional magnitude and constitute a substantial showing of deprivation of substantial rights under Amendments V, VI, and XIV.

As petitioner will also demonstrate infra, the denial of a COA by both the District Court and the Court of Appeals, in

this case, is not consistent with the letter or spirit of the applicable statutes, **28 U.S.C. sect. 2255 and 2253.** An evidentiary hearing or other determination of the facts should have been entertained by the District Court, and the alleged denials of constitutional rights by petitioner should not have been dismissed as they are not without merit or "frivolous". In this matter, a substantial showing of denial of substantive rights has been made. Reasonable jurists may disagree, but without a hearing, and without response from the government, a determination of merit cannot be made. Furthermore, these orders, if not vacated, will effectively deny petitioner any hearing of any of the issues raised in his motions for relief under 28 U.S.C. 2255. Petitioner's arguments have never been heard.[3] Hence petitioner has twice been denied appeal, never having been heard in the Court of Appeals, and now on Motion under 28 U.S.C. Section 2255. Successive petitions are severely limited by A.E.D.P.A.

## REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE SECOND CIRCUIT COURT OF APPEALS, **(1a)**, IS CONTRARY TO THE LETTER AND SPIRIT OF 28 U.S.C. SECT.2255.

The statute provides:

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[3] Petitioner's direct appeal was dismissed. **(62a)**.

**"Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto."28 U.S.C. sect. 2255.**

The court had at its disposal a wide variety of tools with which to develop the record or obtain further discovery. The district court could have proceeded by requiring that the record be expanded to include letters, documentary evidence, exhibits, and answers under oath, or by propounding interrogatories. Chang v. United States, 250 F.3d 79 (2d Cir. 2001). As stated by Judge Sotomayor, Pham v. U.S., 317 F.3d 178, (2nd Cir, 2003):

> "Recognizing the potentially unfair consequences of summary dismissal of a habeas petition, sect. 2255 requires a 'prompt hearing' on the movant's claims, except where the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief."28 U.S.C. Sect. 2255.... The variety of fact-finding approaches taken by courts—from expansion of the record by means of affidavits and other written submissions, or through discovery, to full-blown hearings with

> live testimony by the movant and other witnesses—reflects the fact-sensitive flexibility of sect. 2255 as applied to prisoners' habeas motions... this flexibility is consistent with the 'sound discretion' of a district court to determine the kind of evidentiary hearing, if any to require in a case, citing Sanders v U.S. 373 &U.S. 1, 21 (1963)....

Affidavits may also be submitted and considered as part of the record. Rules-Section 2255 proceedings, Rule 7(a)(b), and of course, the Court may invite a response from the government. Ibid. Rule 7(c). The Court may also refer the motion to a magistrate judge to conduct hearings and to file proposed findings of fact and recommendations for disposition. Ibid. Rule 8(b).

Review of a District Court's dismissal of a sect. 2255 Motion and a denial of a Certificate of Appealability ("COA") is governed by 28 U.S.C. sect. 2253.

As held in Slack v. McDaniel, No. 98-6322 (U.S. 04/26/2000):

> **"1.Where a habeas petitioner seeks to initiate an appeal of the dismissal of his petition after April 24, 1996 (AEDPA's effective date), the right to appeal is governed by the requirements now found at §2253(c) -- which provides, inter alia, that such an appeal may not be taken unless a circuit Justice or judge issues a certificate of appealability (COA), §2253(c)(1), and that the COA may issue**

**only if the applicant has made a substantial showing of the denial of a constitutional right, §2253(c)(2)**

**2. When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue (and an appeal of the district court's order may be taken) if the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. Pp. 6-9."**

The Supreme Court restated the principle above in Miller-El v. Cockrell, 123 S. Ct. 1029, (2003), cited in the decision of the Court of Appeals, **(1a)**, and holding that:

**"When a habeas applicant seeks a COA, the court of appeals should limit its examination to a threshold inquiry into the underlying merit of his claims. E.g., Slack, 529 U.S., at 481. This inquiry does not require full consideration of the factual or legal bases supporting the claims. Consistent with this Court's precedent and the statutory text, the prisoner need only demonstrate "a substantial showing of the denial of a constitutional right." Sec 2253(c) (2). He satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his case or that the issues presented were adequate to deserve encouragement to proceed further. E.g.,id.,**

**at 484. He need not convince a judge, or, or that matter, three judges, that he will prevail, but must demonstrate that reasonable jurists, would find the district court's assessment of the constitutional claims debatable or wrong. Ibid. Pp. 11-13".**

The District Court's resolution of Petitioner's motion is not consistent with these principles. It did not direct an evidentiary hearing but took it upon itself to summarily dismiss the petition. This decision, that there was no merit to petitioner's claims, was not justified in the absence of a hearing or further investigation. Indeed, in suggesting that petitioner's 2255 motion was frivolous and in bad faith, the Court cited Coppedge v. United States, 369 U.S. 438 (1962).[4] In Coppedge, ibid, the Supreme Court held:

> "It is not the burden of the petitioner to show that his appeal has merit, in the sense that he is bound or even likely, to prevail ultimately. He is to be heard, as is any appellant in a criminal case, if he makes a rational argument on the law or facts. It is the burden of the Government in opposing an attempted criminal appeal, to show that the appeal is..... so lacking in merit that the court would dismiss the case on motion of the Government ..."

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[4] Coppedge dealt with indigent appeals and cited 14 cases in which a Court of Appeals had applied an erroneous standard in passing on COA. Coppedge, 82 S.Ct 917 (1962), FN 1.

Neither the decision of the district court or that of the Court of Appeals is consistent with these principles. As held in Barefoot v. Estelle, 463 U. S. 880, 893,894 and n. 4, and Miller-El v. Cockrell, ibid, a substantial showing of the denial of a right includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were "adequate to deserve encouragement to proceed further".

The United States Court of Appeals for the Second Circuit, in sustaining the District Court's decision without a hearing, has failed in this case to adhere to these established Supreme Court holdings".

## II. THE DECISION OF THE COURT OF APPEALS IS CONTRARY TO ITS PRIOR HOLDINGS.

The Court of Appeals for the Second Circuit has outlined the procedure that it will follow in considering whether to issue a COA after denial by a district court. Lozada v. U.S. 107 F.3d 1000 (2d Cir. 1997).

In Pham v. U.S. 317 F.3d 178 (2nd Cir. 2003), the Court held that the district court, in its failure to draw upon existing parts of the record to support its conclusions, abused its discretion in its selective consideration of the record. It also held, that while the district court has wide discretion in developing the record it will use to determine a

habeas petition, that discretion does not extend to summary dismissals of petitions presenting facially valid claims and off-the-record interactions with trial counsel. See also Chang, 250 F.3d 79, 85(2d Cir, 2001). It remanded to allow the district court another opportunity to review the petition.

Judge Sotomayor, in concurring noted Ibid:

> **"Recognizing the potentially unfair consequences of summary dismissal of a habeas petition, sec 2255 requires a "prompt hearing" on the movant's claims, except where the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. 2255.[5]**

In Johnson v. U.S., 313 F.3d 815 (2d Cir. 2002), the Court held that the district court's ruling on the merits of petitioner's constitutional claim was at best, "debatable," and reversed the district court's denial of the petitioner's section 2255 motion.

Of course, in certain cases and under certain circumstances, it may be appropriate for a district court to dismiss a 2255 petition. Waiver of right to collaterally attack, see Garcia-Santos v. US 273 F.3d 506 (2d Cir. 2001), incomprehensible pleadings, Jackson v. Albany Appeal Bureau Unit, 442 F. 3d 51

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[5] In Chang v. U.S., 250 F.3d (2nd Cir. 2001), the Appeals Court affirmed on the ground that the district court's review of submitted papers constituted a sufficient evidentiary hearing on the facts of the case., however, it held that an evidentiary hearing was necessary.

(2nd Cir. 2006), and lack of jurisdiction, Santiago v. U.S. 64 Fed. Appx. 281 (2nd Cir. 2003), have all been cited as justifiable reasons to dismiss petitions without evidentiary hearings or further proceedings[6]. None of the above applies to this petitioner's application for relief under 28 U.S.C. 2255.

Other circuits agree in their holdings in similar cases, that evidentiary hearing is necessary. The 1st Circuit held, in Desmond v. U.S., 333 F.2d 378 (1964), that, "it is not the burden of the petitioner to show that his appeal has merit, in the sense that he is bound or even likely, to prevail ultimately. He is to be heard if he makes a rational argument on the law or facts". See also Bender vs. U.S. 387 F.2d 628; Machibroda v. U.S. 82 S.Ct 510, 368 U.S. 487 (U.S. 02/19/1962).

A district court's denial of a hearing under 28 U.S.C. sec 2255 is reviewed for abuse of discretion. The Court of appeals reviews factual findings for clear error and questions of law *de novo*. Chang v. U.S. 250 F.3d 79 (2d Cir. 05/04/2001). However, in this case, there were no factual findings cited by the district court, and no citings to the record. No issues of law were decided. Because of the absence of any hearing or expansion of the record, there were no additional facts obtained by the lower court and no analysis of stated Grounds for relief. **(54a-55a)**. There was no legal basis cited for the decision of the district court, which only presented statements of conclusion and summary dismissal. The Court of

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[6] In Espaillat v. U.S. No. 03-2020 (2nd Cir. 2004) the Court held that petitioner's argument was outside the bounds of the COA, and refused to address it.

Appeals, **(1a)**, failed to reverse the district court's error. The language of 28 U.S.C. Sect. 2255 indicates that summary dismissal of a petition is inappropriate in most cases, as section 2255 clearly states:

> "unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the U.S. attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto." 28 U.S.C.2255.

As stated in Desmond v. U.S. Ibid, supra:

> "In Ellis v. United States, 356 U.S. 674, 675, 78 S. Ct. 974, 2 L. Ed. 2d 1060 (1958), the Court held that the request of an indigent for leave to appeal in forma pauperis "must" be allowed unless the issues raised are so frivolous that the appeal would be dismissed in the case of a non-indigent litigant. And in Coppedge v. United States, supra, the Court, in articulating the standards to be applied by the lower federal courts in passing upon applications for leave to appeal convictions in forma pauperis, said, 369 U.S. at page 448, 82 S. Ct. at page 922: "It is not the burden of the petitioner to show that his appeal has merit, in the sense that he is bound, or even likely, to prevail ultimately. He is to be heard, as is any appellant in a criminal case, if he makes a rational argument on

> the law or facts. It is the burden of the Government, in opposing an attempted criminal appeal in forma pauperis, to show that the appeal is lacking in merit, indeed, that it is so lacking in merit that the court would dismiss the case on motion of the Government, had the case been docketed and a record been filed by an appellant able to afford the expense of complying with those requirements."

The grounds for relief cited in petitioner's motion are far from frivolous or lacking in merit. The petitioner need not show "plain reversible error, but the shoe is on the other foot and to defeat relief, the Government must show that appellate relief would be futile". Desmond, Id.

## III. PETITIONER HAS MADE A SUBSTANTIAL SHOWING OF DENIAL OF CONSTITUTIONAL RIGHTS

Petitioner's grounds for relief under 28 U.S.C. sect. 2255 represent a substantial showing of denial of substantive rights. The grounds for relief are put forth in petitioner's briefs, **(2a, 37a, 53a)**. Reasonable jurists could debate whether the asserted grounds justify relief from conviction and sentence. The District Court and the Court of Appeals for the Second Circuit erred in determining these grounds to be frivolous or otherwise without merit. An evidentiary hearing, or

other discovery is required to expand the record and should have been granted in order to conclusively establish (or deny) petitioner's right to relief. The District Court and Court of Appeals summary determinations, that petitioner is not entitled to relief, are in error. They are not consistent with the facts as alleged, or with the record. They are conclusory, and not consistent with the holdings of the Appeals Court or those of the U.S. Supreme Court, e.g. Miller-El v. Cockrell, ibid.

Ground One of Petitioner's 2255 Motion **(54a)** challenges the sufficiency of the Indictment (Counts 3-11), and the actions of the U.S. Attorney in withholding from the Grand Jury facts which would negate guilt or influence their vote to indict.

The failure to allege in the Indictment that petitioner acted knowingly and intentionally to harm the victim insurers, and the failure to demonstrate a scheme to defraud the insurers of disability payments, would constitute a substantial denial of constitutional rights under Constitutional Amendments V, VI, and XIV. Without charging the essential elements of the offense of Mail Fraud, petitioner could not know against what he was to defend himself. The repeated assertions that he was not disabled flew in the face of the legal determination by the Social Security Administration, that he was disabled by a "listed impairment" and therefore incapable of gainful employment[7]. Reasonable jurists could perhaps disagree, but perhaps they would agree, that the facts controvert the false statements in the Indictment (**2a-3a**), that

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[7] The Social Security Administration's determination (20a) was based upon x-rays showing a "listed impairment".

a scheme to defraud was not alleged (**3a-4a**), and that the other essential elements of intent, knowledge and willfulness do not appear in counts 3-11 of the Indictment. The District Court in its decision, and the Court of Appeals, failed to address these issues. (**1a, 57a**).

Similarly, the District Court and the Court of Appeals failed to address the issues of misconduct raised in Grounds One and Three: that the U.S. Attorney withheld from the Grand Jury facts which were known and which would negate guilt or influence their vote to indict (or otherwise improperly influenced the jurors). **(54a).** This resulted in the repeated false premise, **(3a)**, that petitioner-defendant was not disabled.

This misconduct converted the issue of fraud into a dispute over whether or not the petitioner was disabled, and ignored the findings of the Social Security Administration, insurance company independent medical examiners and treating physicians. Petitioner was and continues to be disabled. He could not have committed disability fraud.

Reasonable jurists could debate or agree on these issues. The District Court and The Court of Appeals have neglected to cite to any evidence in the record refuting these claims. In fact, there is cited evidence in the record that the District Court itself at least debated, or was unsure of some of these issues. **(4a)**.

Note also, the Transcript, pretrial conference, June 24, 2003, pp 39:

> Mr. Fish (US ATTY): ...he was applying for the insurance, with anticipation of

executing the scheme. I understand that that wasn't the crime but....

The Court: Let's put it this way. In anticipation of possibly executing the scheme. Obviously if—well, I mean I don't know. I don't know what your position is.

And, Transcript of conference, June 24, 2003, page 49:

The Court: You say the government is going to simply attempt to prove... that he wasn't disabled for the period of time that he said he was disabled, and that there is no dispute with regard to his disability. But the fact is that that's not the way it's charged (in the indictment). I don't know what the government ultimately will be able to prove, but the government has charged in this indictment that as of January of 1999, that your client was not disabled. That's what they claim. So, I assume that's going to be part of their proof. If that is not going to be part of their proof, that's a different issue....Despite your doctor's note, they say in January of 1999 he claimed he was disabled and he was not in fact disabled as of that date."

Reasonable jurists could disagree, but it is obvious that the Court's conception of the scheme was unclear and debatable. See 20a – 26a). The Court also expressed the opinion that Petitioner convinced his treating physician, the insurance company independent medical examiners, and the Social Security Administration

that he was disabled. The Court disregarded the factual evidence and even refused to read the medical report of the insurer's independent medical examiner. The Court's rationalization of the "fraudulent scheme" is not charged in the indictment. A scheme supporting fraud was not alleged. Petitioner was disabled as a matter of law by factual determination of the Social Security Administration.

The allegation of facial insufficiency of the Indictment and the allegations of prosecutorial misconduct with respect to conduct of the grand jury require a look into the record, including grand jury minutes, to confirm whether facts, which would negate guilt and influence the vote of jurors to indict, were intentionally withheld from the grand jury. The failures of the Indictment outlined in petitioner's briefs could be debated by reasonable jurists, and could result in reversal of conviction. Petitioner was prejudiced by violation of Amendments V, VI and XIV in not being informed of the nature and cause of the accusation, and being charged with a false and flawed indictment.

Reasonable jurists could debate Ground Two (**39a-40a**), or would agree that there is no evidence in the record, that the essential elements of the offenses of mail fraud and of conspiracy were ever explained, either by defense counsel or by the court, or, that petitioner was informed, and understood, the essential elements of the offenses when he was convinced to plead guilty. A review of the record would support petitioner's claim, there is no record evidence that petitioner was informed at any time

either by his defense counsel, or the court, of the essential elements of the offenses with which he was charged and to which he pled guilty. Certainly, the facially insufficient indictment, in not alleging the essential elements of the crime of mail fraud, could not be the basis for an intelligent and knowing plea. His plea cannot therefore be voluntary. (**4a-5a, 7a-13a, 39a-40a, 54a**).

Similarly, reasonable jurists could debate whether the plea proceeding was in compliance with FRCrP, Rule 11, and whether the court could have had a factual basis for the plea. (**7a-13a, 39a-40a**). They could also debate whether or not the brief, 5-7 minute plea proceeding, with no real colloquy, also violated this rule.

In Henderson v. Morgan, 426 U.S. 637, 96 S.Ct. 2253 (1976), the failure to explain the true nature of the offenses, that intent to cause death of the victim was an essential element of the offense of second-degree murder, and that the absence of an admission implying that he had such intent was held to invalidate petitioner's guilty plea as involuntary. Petitioner in this case was never informed, *and did not admit*, intent to defraud, or harm, the insurers, an essential element of the offense of fraud.

Similarly, in Boykin v. Alabama, 89 S.Ct. 1709, 395 U.S. 238, the Supreme Court held that there was reversible error where record did not disclose that defendant voluntarily and understandingly entered his plea of guilty.

In this case, petitioner did not admit conduct that showed intent to harm or defraud.

The conduct admitted by petitioner, working while disabled, is not a crime. Petitioner never claimed he was not disabled, and could not claim, in the face of the determinations of the S.S.A., insurance examiners and his private physicians, that he was not disabled. Knowing that he was disabled, petitioner could not possess the intent to defraud, and could not reasonably plead guilty. As discussed infra, ineffective counsel convinced petitioner to plead guilty by deceiving him as to the true elements of the offense.

As held in Ames, v. NYS Board of Parole, 539 F. Supp. 972 (EDNY, 1984), the essential element of the crime of Mail Fraud, the intent to harm the victim, could not be inferred from defendant's recitation of his conduct. Furthermore, it was held that where there is a discrepancy between crime being pleaded to and conduct being admitted, trial judge must take additional steps to guarantee a factual basis for the guilty plea. A plea cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts; McCarthy 394 U.S.459, at 466, 89 S.Ct. 1166, at 1170.

Finally, in Bousley v. U.S. 523 U.S. 614, 118 S.Ct. 1604 (1998), the defendant was misinformed about the elements of the offense. Conviction was reversed and the case was remanded to permit petitioner to attempt to make a showing of factual innocence. Petitioner's case should similarly be remanded. Reasonable jurists could conclude, or agree, that in the face of proven disability, there is factual innocence, and, that no reasonable juror could convict of disability fraud. **(6a).**

**Petitioner's claims of ineffective assistance of counsel cannot be determined without an evidentiary hearing.**

Reasonable jurists could debate or agree that trial counsel's assistance was ineffective. **(55a).** The district court abused its discretion in determining that there was no merit to petitioner's claim of ineffective assistance of counsel. Its statement that petitioner's claim is "clearly without merit" and that petitioner "cannot demonstrate" ineffective assistance, (**57a, fn 2**), are made without reference to record evidence and clearly violates 28 U.S.C. sect. 2255. As held in Pham v. U.S. 317 F.3d 178 (2d Cir. 2003), the district court has wide discretion in developing the record to support its conclusions. That discretion, however, does not extent to summary dismissals of petitions presenting facially valid claims and off-the-record interactions with trial counsel. Ibid, citing Chang, 250 F.3d at 85.

Defense counsel's trial strategy was flawed. **(13a-17a).** After his failure to convince the court to limit the trial on the terms he presented, he found himself unprepared to continue. Petitioner, having been deceived by his counsel's purported preparation for trial, was suddenly confronted by a complete reversal of his counsel's position. As counsel stated on the record when he was trying to convince petitioner to plead guilty, "I am having a difficult discussion with my client and his wife". Whereas, on the day before, in opening statement, he told the jury to, "keep an open mind".

There is also record evidence showing trial counsel's misconception of the Government's case and what they were attempting to prove. Defense counsel failed to accept what was obvious in the false statements in the indictment- that the Government was claiming that Petitioner was not disabled. Defense counsel failed to prepare for the obvious.**(14a,15a).**

After the opening statement of the government, defense counsel recognized his failure and recognized that he was not prepared to proceed. He then insisted that petitioner plead guilty[8].

Defense counsel's failures to inform the defendant-petitioner of the essential elements of the offenses (13a), and his insistence that petitioner plead guilty to a false and flawed indictment, are serious allegations demanding an evidentiary hearing.

In Bradshaw v. Stumph, S.Ct. 2398, 545 U.S. 175, (U.S. 06/13/2005), the Supreme Court held that:

> "...constitutional requirements may be satisfied where the record accurately reflects that the charge's nature and the crime's elements were explained to the defendant by his own, competent counsel".

It also cited Henderson v. Morgan, that:

> "Where a defendant pleads guilty to a crime without having been informed of the crime's elements, this standard is not

[8] Trial counsel also had a concurrent commitment to the defense of Michael Jackson in Santa Maria, California. (17a).

met and the plea is invalid. 426 U.S. 637 (1976)".

There is no record evidence in this case, and the District Court did not cite to evidence, that petitioner was informed of the essential elements of the offenses to which he pleaded guilty.

Reasonable jurists could debate, or agree, as to whether defense counsel's performance was ineffective, and whether petitioner was prejudiced thereby. The allegations of failure to prepare for trial, failure to prepare key witnesses, and failure to acknowledge and prepare for, the prosecution's main argument (that petitioner was not disabled) are corroborated by the record.

## IV. THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT ERRED IN NOT REMANDING THIS MATTER TO THE DISTRICT COURT FOR FURTHER FACT FINDING

In Hanna v. U.S., No. 02-2303 (2d Cir. 12/31/2003), the Court of Appeals vacated the district court's order dismissing Hanna's claims against counsel, and instructed the court below, " to conduct the necessary fact-finding". The scant record evidence did not permit the court to evaluate his representation prior to and during Hanna's guilty plea. Hence, the court remanded for "fact finding".

The issue of ineffectiveness of counsel is an issue of law and fact and in the current case should be subject to the same scrutiny as was

afforded Hanna, ibid. The issues here are more serious and numerous and cannot be evaluated without further hearing and discovery by the court. They can hardly be deemed frivolous, but are debatable, as reasonable jurists could agree or disagree thereon. Constitutional Amendment XIV ensures petitioner due process and equal protection on this significant issue.

More fundamentally, as stated in Miller-El v. Cockrell, ibid., the Appeals court was incorrect in not demanding inquiry as to whether a "substantial showing of the denial of a constitutional right" had been proved, as 28 U.S.C. sec 2253 (c) (2) requires. The question is the debatability of the underlying constitutional claim, not the resolution of that debate. **In this case, the district court precluded opportunity to debate.** The conclusion that the issues are frivolous and meritless, rather than debatable, is in error. Reasonable jurists could disagree with the District Court's disposition of these claims, and at the least could conclude the issues presented are adequate to deserve encouragement to proceed further. Slack, ibid, at 484.

In Miller-Ell v. Cockrell, id, the Petitioner's claim rested upon a Batson violation which resulted in a death penalty. Although the death penalty is not at issue in this case, the issues in this case should be subject to the same analysis. It is the debatability of the underlying constitutional claims, not the resolution of that debate which is the issue to be determined. Id, at 13. Petitioner is entitled to be heard on his claims.

The issue is of particular significance in this petitioner's case, as there has never been a

hearing of his arguments, or a response by the government.[9] The District Court dismissed petitioner's motion as meritless and lacking facial validity without any analysis or opinion, and also made the conclusory statement that:

> "Petitioner's new claim of ineffective assistance of counsel is clearly without substantive merit...."

With this unfounded statement, the district court washed away petitioners substantial showing of denial of effective assistance of counsel. This was not warranted, because, as in Chang, id, petitioner has made colorable claims of denial of constitutional rights and has presented substantiation or corroboration of those claims. As in the holding in that case, the claims in this case are not so clearly bereft of merit as to be subject to dismissal on their face. Furthermore, several of the claims involve off-the-record interactions with trial counsel, and matters concerning the conduct of the grand jury and prosecutors, which cannot be determined by examining the motion, files and records before the district court.

"Actions taken by counsel, or others, outside the presence of the trial judge... (can)not ordinarily be resolved by him without... a hearing." Armienti v. U.S., 234 f.3d 820, 825 (2d Cir. 2000), holding that an evidentiary hearing was required:

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[9] In Miller-El's case, this court found that a COA should have been issued...because "the District Court did not give full consideration to the substantial evidence petitioner put forth in support of the prima facie case.. Instead, it accepted without question the state court's evaluation..... The Court of Appeals evaluated.... application for a COA in the same way."

"To prevail on his motion for a hearing, [Armienti] must establish that he has a "plausible" claim of ineffective assistance of counsel. At this preliminary stage he is not required to establish that he will necessarily succeed on the claim, and indeed, if he could presently prove that proposition, no hearing would be necessary. United States v. Tarricone, 996 F.2d 1414, 1418 (2d Cir. 1993) (citing United States v. Matos, 905 F.2d 30, 33-34 (2d Cir. 1990); additional citation omitted".

In place of an evidentiary hearing, it may be appropriate to proceed by requiring that the record be expanded to include letters, documentary evidence, and, in an appropriate case, even affidavits. Raines v US, 423 F.2d 526, 529-30 (4th Cir. 1970): **"Unless it is clear from the pleadings and the files and records that the prisoner is entitled to no relief, the statute makes a hearing mandatory".**

The district court had a wide variety of tools at its disposal with which to develop the record in this case, yet failed to make use of them. In recalling only its prior decisions in this matter, the court abused its discretion. The matter should be remanded to the district court to allow another opportunity to review the petition. The petition should be reviewed by an alternate judge, one not involved in prior proceedings.

Because the questions and issues raised by petitioner present a mixed question of law and fact, the district court abused its discretion denying an evidentiary hearing and dismissing the

motion. The district court's selective consideration of the record and its failure to even draw upon existing parts of the record to support its conclusions is further evidence of it abuse of discretion. The Court of appeals did not correct the lower court error by ordering a remand. This honorable court should grant a writ of certiorari and order remand to the district court for expansion of the record and referral, if necessary, to an alternate judge to determine the issues raised by petitioner.

As stated in LLOYD SCHLUP v. PAUL K. DELO, 115 S. Ct. 851 (U.S. 01/23/1995):

> "Indeed, concern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system. That concern is reflected, for example, in the "fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." In re Winship,397 U.S. 358, 372, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970) (Harlan, J., concurring).

## CONCLUSION

1. The District court erred in summarily dismissing petitioner's motion for relief under 28 U.S.C. sect. 2255. An evidentiary hearing

or other expansion of the record should have been conducted to determine the merit of petitioner's claims.

2. The U.S. Court of appeals erred in denying a certificate of appealability. In the absence of an evidentiary hearing or other investigation of petitioner's claims, it could not determine whether petitioner made a substantial showing of the denial of a constitutional right.

3. The decision of the Court of Appeals (**1a)** should be vacated and remanded with instruction to remand to the District Court for further fact finding or evidentiary hearing.

4. If the matter is remanded to the District court, an alternate justice should be assigned. Rule 4, Section 2255 Proceedings, see Advisory Committee Notes, 1976 Adoption, citing Halliday v. U.S. 380 F.2d 270 (1st Cir.1967); 43a.

Respectfully submitted:

Peter J. Corines
Petitioner, pro se

# APPENDIX

S.D.N.Y. - NYC
06-cv-10219
02-cr-0021
Daniels, J.

UNITED STATES COURT OF APPEALS
for the
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 28th day of June, two thousand seven,

Present:
Hon. José A. Cabranes, Hon. Reena Raggi,
*Circuit Judges*, Hon. Edward R. Korman*
*District Judge*.

Peter Corines,

*Petitioner-Appellant,*

v. 07-0711-pr

United States of America,

*Respondent-Appellee.*

Appellant, *pro se*, moves for a certificate of appealability. Upon due consideration, it is hereby ORDERED that the motion is DENIED and the appeal is DISMISSED because Appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c)" *Miller-El v. Cockrell*, 537 U.S. 322 (2003).

FOR THE COURT:
Catherine O'Hagen Wolfe
By: s/ Lucille Carr

June 28, 2007

* The Honorable Edward R. Korman, of the United States District Court for the Eastern District of New York, sitting by designation.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETER J. CORINES

Plaintiff, pro se, 07-cv-0711

-v- MOTION FOR CERTIFICATE OF APPEALABILITY

UNITED STATES OF AMERICA,

Defendant.

Peter J. Corines, plaintiff, pro se, pursuant Title 28, Part VI, Chapter 153, U.S.C. 2253(c), and pursuant to F.R.A.P. 22(b) and Local Rule 22(b), makes this request for a Certificate of Appealablity.

## I. FACIAL INSUFFICIENCY OF THE INDICTMENT

The trial court was without jurisdiction because the indictment (counts 4-11)[1] was facially insufficient. The indictment did not allege the elements of the offense of mail fraud. It was insufficient in not alleging a scheme that could support the offense of fraud. It failed to allege specific intent to commit the offense or that the acts and alleged scheme were intentionally devised or knowingly and intentionally devised. It therefore failed to state a cause of action. It could not serve to put defendant on notice as to what acts he had to defend. It also, as is discussed infra, contained facts that were false and known to be false to the US Attorney.

The indictment, Indictment page 10, alleges the following as "The Fraudulent Scheme":

Footnote 1

On September 17, 2003, by order of the Court, counts 4-11 were severed from counts 1-3 by order of the Court.

19. After (defendant) became aware that he was at risk of losing his medical license .....(defendant) applied for two additional disability insurance policies.... in the event of total disability.
21. In or about late October....the defendant submitted three claims for benefits.....defendant falsely and fraudulently represented that he had been totally disabled and that he had been confined to the house .....
22. In his claim for benefits, defendant false and fraudulently falsely (sic) represented that he had been totally disabled...and that he had not engaged in any work....
23. To substantiate his claims, defendant made several false and fraudulent statements to his insurers.....
24. ...defendant advised (insurer)...that he was eager to return to the performance of surgical procedures and similarly advised (insurer) that he would "like to get back to work" without advising either insurer that his license to practice medicine had been revoked- a fact that was material to the insurers' coverage decisions.
26. After... defendant. ...continued to seek payments on his disability insurance policies, falsely representing his continued total disability, when, in truth and in fact, he was not totally disabled.

THE INDICTMENT FAILS TO ALLEGE SPECIFIC INTENT TO DEFRAUD

The indictment failed to allege that defendant did knowingly and intentionally devise or intend to devise a scheme and artifice to defraud. The absence of such language omits the necessary element of specific intent to commit the offense.

The purported "scheme" as described involves only the purchase of insurance. There was not an allegation that insurance was illegally purchased by misrepresentations in the applications for coverage. The legal purchase of insurance cannot support the element of the offense as a "scheme to defraud".

THE ACTS SPECIFIED IN THE INDICTMENT DO NOT CONSTITUTE A CRIME UNDER FEDERAL LAW

The acts alleged in the indictment, false statements on an insurance claim, do not specify a crime under federal law. The District Court, Justice Daniels stated: Transcript, July 16, 2003,page 39:

The Court: Well, but applying for the disability insurance is not a crime.

The US Attorney agreed:

"It was part of this scheme. I think when he was applying-- certainly it's the government's view that when he was applying for the insurance, he was applying for it with anticipation of executing the scheme. I understand that wasn't the crime but...

THE COURT: Let's put it this way. In anticipation of possibly executing the scheme. Obviously if -- well, I mean I don't know. I don't know if your position is if he didn't get this far -- if he didn't lose his license, he wouldn't execute the scheme. I don't know. (emphasis added)

It is clear that there was no scheme devised or intended to be devised that could support the offense of mail fraud. Furthermore, as discussed below, the fact that defendant was disabled as a matter of law was known to the US Attorney. He was also aware that one of the insurer's definitions of disability was loss of license, and that defendant's disability was confirmed by insurer's consultant. Exhibit 2.

II. Prosecutorial Misconduct

In presenting this matter to the grand jury, the prosecution engaged in misconduct in failing to disclose to the grand jury evidence which would have negated guilt, specifically, the fact that defendant/petitioner was disabled as a matter of law by the Social Security Administration, Exhibit 1, and that the insurers' consultant found him disabled Exhibit 2 The false fact that defendant was *not disabled* is stated in paragraphs 21, 22, 26, and is a critical flaw. The US Attorney was also

aware that this disability was confirmed by physicians who performed independent medical examinations for the insurers. It is highly unlikely that the Grand Jury would have voted to indict knowing that defendant was disabled. The withholding of this information from the grand jury allowed the prosecution to overreach in an attempt to obtain an indictment where probable cause could not exist. No reasonable juror would have voted to indict knowing that defendant was truly disabled. No reasonable juror would have voted to indict knowing that the insurance company's independent medical examiner agreed that defendant was disabled, or knowing that, in fact, one of the insurance policies insured against loss of license.

It was known to the US Attorney that defendant had instituted a civil lawsuit to recover his disability benefits from the complainant insurers in this matter. They actively pursued prosecution of this matter. Exhibit 4.

The grand jury was used as a tool to aid the insurers in non-criminal litigation. The timing of the indictment renders it suspect. There also was improper communication between the US Attorney and the "victim" insurers, Exhibit 4, who used the pending Indictment as justification to deny payment of disability benefits to defendant. Petitioner was ultimately indicted in January, 2002. This was two and one-half years after investigation was begun, but only weeks after defendant filed suit in NYS Supreme Court to collect disability benefits from the insurers. NYS Supreme Court, Index# 2001/601585. This indictment had been threatened by insurance company personnel during negotiations for payment of benefits.

ABA Standards of Criminal Justice Standard 3-3.6 © provides that a prosecutor should recommend that the grand jury not indict if he or she believes the evidence presented does not warrant an indictment under governing law.

The prosecutor failed to exercise proper discretion in instituting, or causing to be instituted, criminal charges when the prosecutor knew that the charges are

not supported by probable cause and in the absence of sufficient admissible evidence to support a conviction.

The prosecution abused his discretion in pursuing prosecution where he knew that no crime had been committed, and in withholding facts that exculpated the accused, including:

I. The fact that he was disabled as a matter of law.

2. The fact that insurers' policies provided benefits for partial disability.

3. The fact that his license was not revoked at the time that he applied for benefits. 2

4. The fact that no harm to any patient was ever alleged in disciplinary proceedings.

The prosecutor could not have informed the grand jury of the elements necessary for the offense of mail fraud, *mens rea and scheme*. The grand jury could not have been properly instructed on the law. The ability to perform work is not inconsistent with disability. Facts inconsistent with guilt were withheld from the grand jury to influence their vote to indict. No reasonable person could find probable cause for disability fraud in the presence of disability.

## III. FACTUAL INNOCENCE

Defendant/petitioner's severe disability, which was confirmed by the Social Security Administration, Exhibit 1, his private physician, and numerous consultants including the Independent Medical Examiners for the insurance companies, Exhibit 2, is consistent with factual innocence of the offense of disability fraud. In the face of disability as a matter of law, the elements of the offense cannot be found. No rational jurist or juror could convict.

Footnote 2

Stay of revocation was in effect until February 4, 1999, pending review of the OPMC determination by the NYS Supreme Court, Appellate Division, 3rd Department

IV. THE GUILTY PLEA WAS NOT MADE INTELLIGENTLY WITH UNDERSTANDING OF THE TRUE NATURE OF THE CHARGES.

1) THE COURT FAILED TO ASCERTAIN DEFENDANT'S KNOWLEDGE OF THE NATURE OF THE OFFENSES.

The defendant did not have real notice of the true nature of the offenses. The court did not explain the elements of the offense and did not inquire of defense counsel whether or not defense counsel had explained the elements of the offenses. The defendant pled guilty without realizing that his conduct did not actually fall within the range of the charges.

2) Defendant Pled Guilty to an Indictment, counts 4-11, that did not charge the elements of the offense.

The transcript of the plea proceeding, Transcript, December 2, 2003, pages 78-93, reveals that the proceeding was essentially devoid of any colloquy between the court and defendant. The court did not attempt to determine whether the requisite elements of the offense of mail fraud, *mens rea and a scheme to defraud*, existed. They did not exist, and could not exist because of petitioner's well established disability as a matter of law. When asked by the Court to state the acts by which the defendant committed the alleged offense, petitioner recited a brief statement prepared by his attorney. The acts included in the statement do not fulfill the elements of the alleged offense. The court did not inquire further, did not explain the elements of the offense to the defendant-petitioner, and did not inquire as to whether petitioner believed he was disabled at the time he committed the alleged acts, or whether the petitioner intended to commit any offense.

Petitioner was therefore not informed that the true elements of the offense did not exist. If petitioner had been made aware, by either the court or his defense counsel, of the real nature of the charges against him, he would not have pleaded guilty. Petitioner was aware that the indictment alleged that he was not disabled and that it failed to allege a

fraudulent scheme, but was not informed that his conduct was not criminal. Therefore, his plea cannot be considered intelligent and voluntary.

3) The court did not state on the record that there was, or that it had established a factual basis for the plea. This is a requirement of FRCP Rule 11. Petitioner was denied the process due according to this rule.

4) The court also did not inform the defendant-petitioner that the plea agreement included a waiver of the right to collaterally attack his sentence.

Prejudice inheres in a failure to comply with Rule 11. Noncompliance deprives the defendant of the Rule's procedural safeguards that are designed to facilitate a more accurate determination of the voluntariness of his plea. It has been held, by the Supreme Court, that a defendant whose plea has been accepted in violation of Rule 11 should be afforded the opportunity to plead anew.

THE PLEA PROCEEDING WAS TAINTED BY FAILURE TO ADHERE TO FRCP, RULE 11

In beginning the proceeding, Justice Daniels confirmed that defendant wished to enter a guilty plea to Count I and Count 6 of the Indictment, and stated:

> "Before I accept a plea from you, I am going to ask you some questions....intended to satisfy me that you wish to plead guilty to these two charges in the indictment because you are, in fact, guilty and that you fully understand the consequences of you plea."

There was no explanation of how the court satisfied itself that defendants conduct fell within the boundaries of the offense. The court focused on the defendant's wish to plead guilty.

The court then embarked upon the litany of rights that defendant would forfeit, and then asked defendant if he had

read the indictment and discussed the charges with his attorneys, to which he responded affirmatively.

Justice Daniels then inquired of the defendant as to whether he understood the nature of the charges to which he was pleading guilty, and stated that the Government would, at trial, have to prove each and every part or element of each of the offenses, beyond a reasonable doubt. However, at this point, no discussion of the elements of the crime ensued.

Subsequently, Transcript, December 2, 2003, page 89, line 8, the court inquired:

"Why don't you tell me what you did in Count 1, and later in Count 6, what you did that makes you guilty of that charge".

In response to Count 6, defendant responded, Transcript, December 2, 2003, page 89, line 18:

"In connection with claims for disability insurance I filed, I falsely claimed that I was not working during the specified time period when I was, in fact, working as a physician surgeon."

At this point, all inquiry of the defendant ceased. There was no discussion of the elements of the offense of mail fraud. There was no discussion of the requisite *specific intent* to defraud. There was no discussion of what was the *scheme to defraud.*

In concluding this proceeding, the Court stated, Transcript, December 2, 2003, page 91, line 10:

"Because you acknowledge you are guilty as charged in Count 1 and Count 6 of the superseding (sic) indictment, because you know your rights and arc waiving them and because our plea is entered knowingly and voluntarily and is supported by an independent basis in fact containing each of the essential elements of those two offenses, I accept your guilty plea and adjudge you guilty of the offense to which so have pled."(emphasis added)

The record is, in fact, devoid of any independent basis in fact containing each of the essential elements of the offenses. The elements of the offenses were never discussed at the plea proceeding. The court may have assumed that the elements of the offenses were explained by defense counsel, but that is not the essence of Rule 11,3 and not consistent with the holding of the Supreme Court. Defense counsel never explained the elements of the offense to the defendant.

THE COURT DID NOT STATE ON THE RECORD A FACTUAL BASIS, AND WAS NOT JUSTIFIED IN ACCEPTING THE PLEA

In the absence of colloquy including discussion of the elements of the offense, the court was not justified in accepting a plea of guilty. As discussed in Ground one, the elements of the offense were never charged in the indictment, nor could they have been, as the defendant was known to be disabled, as confirmed by the Social Security Administration. Exhibit 1. The conduct alleged in the indictment, the purchase of disability insurance and false statements on claim forms, cannot support a charge of fraud. Certainly, in the presence of his proven disability, petitioner could not have had the requisite specific intent to defraud the disability carriers. Specific intent was not alleged.

Any discussion of these facts with the court in colloquy would have rendered the finding of guilt impossible. The true nature of the charges and the elements of the offense were absent. The latter could not be admitted by defendant, because he knew that he was disabled. His conduct did not fall within the charged offense.

The Court did not inquire of defense counsel as to whether the elements of the offenses were explained to the

Footnote 3:
In fact, the elements of the offenses were never explained by defense counsel. See discussion of ineffective assistance of counsel, infra

defendant. There is no way to explain how the defendant, knowing that he was disabled as a matter of law, could believe he was guilty of fraud with respect to his disability claims. One can only conclude that he was not informed of the elements of the offenses. The court could have remedied this problem by inquiring directly of the defendant, but it chose not to do so. Without the defendant having admitted the elements of the offenses, and without the elements having been charged in the indictment, the court accepted a plea of guilty to conduct or acts which did not constitute the offense of mail fraud.4 It made no attempt to verify that defendant's conduct fell within the scope of the offense. Hence, petitioner's plea cannot be considered intelligent and voluntary. Petitioner's disability renders it impossible to have the specific intent to defraud. An illegal scheme to defraud was never charged.

The court hastily inquired, Transcript of plea proceeding, page 84:

> "Have you received a copy of the indictment?" "Have you read it?"

The court did not offer to read the Indictment in open court, and continued:

"Have you discussed all the charges in this indictment with your attorneys?

"Do you understand Count 6 charges you with mail fraud with violation of Title 18, United States Code, Section 1341?"

"Do you understand the nature of that charge?"

"Do you understand that, as I have indicated, the government would have to prove each and every part or element of each one of those offenses against you, that is charged against you beyond a reasonable doubt at a trial?"

Footnote 4:
The same reasoning applies to Count 1, conspiracy. There was no explanation of the elements of the offense either by the Court or by Defense counsel. The Court did not inquire of Defense Counsel whether he had explained the elements to his client.

Defendant answered affirmatively to each question. However, none of the questions demonstrated an attempt to ascertain the defendant's real knowledge of the nature of the offenses. There was no explanation of the elements of the offense of mail fraud and no attempt to determine if they were present. Defendant never admitted the elements of the offense. Of course, he could not have intent to defraud if he was, in fact, disabled. **Defendant never stated that he was not disabled.**

The act admitted in connection with Count 6, mail fraud:

"In connection with claims for disability insurance I filed, I false claimed that I was not working during the specified time period when I was, in fact, working as a physician surgeon."

is not a crime under federal law. Defendant's statement that:

"I — yes, I knew that my conduct was unlawful"

clearly demonstrates that his understanding of the nature of the offenses was not correct. The Court then stated, Transcript of Plea, December 2, 2003 Page 91, line12:

".....because your plea is entered knowingly and voluntarily and is supported by an independent basis in fact containing each of the essential elements of those two offenses, I accept your guilty plea and adjudge you guilty of the offense to which you have pled".

The elements of the offense of mail fraud, mens rea or intent, and a fraudulent scheme were never discussed or even mentioned at this plea proceeding. There was never a true colloquy in that there was no discussion of the elements of the offenses. The court carefully avoided discussing

any detail of the offenses or their elements, and then said that there was an independent basis in fact containing each of the essential elements of the offenses. The latter statement is not consistent with the statements made by the defendant, and certainly not in keeping with Rule 11 which is designed to prevent a defendant from pleading guilty without understanding that his conduct was a crime under federal law.

**Asking the defendant if he is in fact guilty without independently determining if he committed the elements of the offense evades the intent of FRCP Rule 11.**

The court's failure to ascertain that petitioner's conduct fell within the bounds of the charged offense denied petitioner due process. The failure to ascertain that the elements of the offense of mail fraud existed and were admitted by defendant renders his plea involuntary because it is not intelligent. It is therefore invalid.

Petitioner's substantial rights were violated by the Court's failures at the plea proceeding. The plea should not have been accepted because the elements of the offense were not admitted by petitioner, and a factual basis for the plea was not stated on the record. This is a violation of due process and is properly subject to collateral review. It is a constitutionally required determination that a defendant's guilty plea be truly voluntary.

## V. INEFFECTIVE ASSISTANCE OF COUNSEL

Petitioner was prejudiced by defense counsel's ineffective assistance. Ineffective assistance of counsel was manifested by the following deficiencies:

1. Defense counsel failed to explain to defendant the elements of the offense of mail fraud. Defendant was, therefore, not informed of the real nature of the charges.

Defense counsel failed to explain to defendant that his alleged conduct was not within the offense of mail fraud.

2. Defense counsel pursued a flawed strategy and was not prepared for trial. When his flawed trial strategy failed, as discussed infra, he had no alternate strategy and could not reasonably proceed because he found himself inadequately prepared. He deceived petitioner by not being prepared for trial, and then coerced him into pleading guilty.

3. Defense counsel failed to explain to defendant that the indictment was facially insufficient.

4. Defense counsel failed to explain to defendant that there was probable prosecutorial misconduct.

5. Defense counsel failed to motion the court to dismiss or correct the facially insufficient indictment. He did not ask for in-camera review of the grand jury proceedings. He did not ask that the untrue statements about defendant's disability be corrected. He failed to object, in any way, to either the original or the superceding indictment. He failed to ask for correction of false statements therein, or for the redaction of inflammatory statements. He did not challenge the duplicity or multiplicity of the indictment. Defendant, therefore, was deprived of his right to challenge this facially insufficient indictment. Defendant's constitutional right to be on notice of the true charges and not to be falsely accused was violated by these deficiencies. Petitioner was, therefore, prejudiced by this ineffective assistance of counsel.

6. At the time of trial, after two years of pre trial proceedings, new defense counsel was retained for trial. Trial counsel was ineffective and performance fell below the required norms in that:

A) Trial counsel, failed to properly prepare for trial by failing to investigate and by failing to interview or consult with any experts, fact witnesses, or consultants in the field of disability. He failed to interview medical or other experts. He failed to consult legal experts or perform proper research to properly defend petitioner. Defendant's treating physician and insurance company physicians were not interviewed or prepared for trial. Former employees of petitioner were not contacted or interviewed.

B) Defense counsel, from the time of indictment through the time of conviction, and despite urging by defendant, did not consult with any expert in the field of disability, medicine, law or with any of petitioner's numerous employees.

As a result of the above failures, defense counsel showed a lack of understanding of many issues. At the time of trial, defense counsel stated, Transcript December 1, 2003, page 11:

"But the government has never, to my knowledge, never intended that the engine of this trial be showing proof that the defendant was not disabled..."

And, page 10:

"Whether of not you are disabled, that is a term of art because they are not calling medical experts to dispute the issue whether he was or he wasn't disabled,

And on page 21:

"The defendant doesn't get money here from two out of the three insurance companies anyway so there is no allegation that he got paid from theses false disability claims." (Emphasis added).

These statements are in conflict with the allegations in the Indictment and with the government's opening statements at trial. The government clearly stated that this case was about disability insurance fraud, and that the defendant claimed that he was totally disabled... when in reality he was continuing to work.

C. Defense counsel pursued a strategy, Transcript, December 1, 2003. page 7, wherein he attempted to convince the court to limit testimony and evidence to the time period June, 1998 through January, 1999, but that he should be allowed to include a medical report dated May, 1999. After a long argument, this proposed stipulation was denied by the court.

D. Defense counsel had stipulated, pre-trial, to admission of over 40 exhibits into evidence by the Government allowing them to proceed without presenting witnesses to prove their facts [5], Exhibit 3. Defendant was therefore deprived of his right to confront accusers and cross-examine their testimony.

Furthermore, pertinent evidence for the defense was not admitted by stipulation, and no witnesses were prepared for trial. Defense counsel abdicated his responsibility to defend against the evidence presented. Without expert

Footnote 5:
Similarly, the government was relieved of the responsibility to present patients it alleged were treated by defendant when he was "working".

witnesses and the defendant's treating physicians to testify, the allegations of the government could not be disproved. Defendant was deprived of a viable defense to the government's case.

Defense counsel also failed to subpoena and prepare surgeons who were hired by defendant to replace him when he could not work because of his disability. Given these deficiencies in trial counsel's performance and preparation, defendant was prejudiced by not having counsel that was prepared for trial of the issues. Defendant was deprived of his right to defend himself against the government charges by stipulating to all of their evidence prior to trial. Exhibit 4.

7. Defense counsel's flawed strategy for trial was not consistent with accepted criminal practice. As he stated the court: Transcript, December l 2003, Page 7:

" ....we have stipulated about 90 percent of what the proof would otherwise require in the way of live witnesses and I think we shortened a two week trial that could be over in a day or two because the issues are really narrowed,..."

He intended to present no fact witnesses, no expert witnesses, and no physicians to attest to defendant's disability. He stipulated that the government could enter into evidence over forty documents supporting their positions, and did not stipulate to enter into evidence any documents supporting defendant's position. He did not subpoena or intend to present several witnesses, as requested by defendant, including his treating physician and many consultants (including the insurance company consultants) supporting defendant's disability. He did not produce the determination of the Social Security Administration, awarding defendant disability.

8. Defense counsel failed to subpoena patients or employees of defendant as witnesses.

9. Defense counsel also agreed with the government, not to present any medical witnesses to dispute the claim that defendant was not disabled.

10. In stipulating much of the government's evidence, defense counsel deprived defendant of the right to cross-examine their witnesses and refute the evidence presented.

11. Defense counsel failed to subpoena for trial any witnesses, experts, treating physicians, social security personnel or records, or insurance company documents or personnel.

12. Defense counsel failed to subpoena numerous physicians, including defendant's treating physician, Sydney Goldman, despite numerous requests. In fact, he was never interviewed by trial counsel.

13. When, after opening statements, Transcript, December 1, 2003, pages 49-70, defense counsel realized that his flawed strategy had failed, and that he had no alternate plan or strategy with which to continue, he coerced defendant to plead guilty.6

The many short-cuts taken by defense counsel fell below the objective standard of reasonableness under prevailing professional norms, and petitioner was thereby prejudiced.7 Defense Counsel stated to the court that trial would be over in a day. Transcript, December 1, 2003, page 43.

Defendant was deceived by defense counsel. He believed that his counsel was prepared to defend his client. He obviously was not prepared for this trial. Defendant was then coerced by his counsel to plead guilty because defense counsel was not, for the reasons outlined above, prepared to defend his client.

Footnote 6:
On the morning of the second day of trial, defense counsel stated to the Court: Transcript, December 2, 2003, page 74: "Were (sic) having a very difficult discussion with defendant and his wife...."

Footnote 7: Defense counsel was apparently retained by Michael Jackson in anticipation of Indictment in California. Jackson's ranch was searched in mid November, 2003, only two weeks before the current trial was scheduled to begin. Shortly after trial, defense counsel appeared on television at Jackson's legal proceedings. This explains defense counsel's haste to complete defendant's trial.

VI. THE COURT DID NOT COMPREHEND THE DEFINITION OF DISABILITY AND COULD NOT THEREFORE IMPARTIALLY JUDGE PETITIONER'S CASE

Throughout the two years of the pre trial proceedings, the court showed a lack of impartiality towards the defendant.

1. The court was aware that the Indictment improperly stated that defendant was not disabled, yet did not take steps to correct its deficiencies.

2. The court implied that a finding of disability by consultant physicians was not reliable as evidence of disability. It similarly disregarded the findings of the Social Security Administration. Exhibit I. The Court stated, Transcript, December 1, 2003, page 10:

> "A person who says that they weren't working when they were, in fact, working is clearly not disabled because they obviously are capable of doing the job, whether or not they have medical evidence or not (sic)."

This statement is not consistent with either New York State or Federal law on disability.

3. The Court dismissed defendant's 2255 Motion, without a hearing of the issues, and denied a COA. His order further stated that any appeal would not be taken in good faith.

Defendant-petitioner respectfully submits that the above demonstrate a lack of impartiality, and a failure of the court to construe disability. This created confusion of the issues created by the false and flawed Indictment. Petitioner is entitled not only to a clear statement of the issues, but to a fair hearing as well.

## CONCLUSION

Petitioner has made a substantial showing of the denial of several constitutional rights. He believes that he should be given an opportunity to be heard on the issues

elaborated in this motion, and respectfully requests that this court grant a Certificate of Appealability.

Respectfully submitted:

Peter J. Corines,
249 Park Avenue
Petitioner, pro se

Dated: March 26, 2007

Eastchester, New York 10709
914 779 0539

**534: Exh.E, Determination of Social Security Administration**

Social Security Administration 534
Retirement, Survivors and,Disability Insurance
Notice of Award

Office of Central Operations
1500 Woodlawn Drive
Baltimore, Maryland 21241-1500
Date: May 23, 2000
Claim Number: 120-38-8989HA

PETER J CORINES
515E 79TH ST APT 25A
NEW YORK, NY 10021-0780

.

You are entitled to monthly disability benefits beginning April 1999.

The Date You Became Disabled

We found that you became disabled under our rules on October 31, 1998.
However, you have to be disabled for 5 full calendar months in a row before you can be entitled to benefits. For these reasons, your first month of entitlement to benefits is April 1999.

What We Will Pay And When

- You will receive ---------- around May 29, 2000.
- This is the money you are due for April 1999 through April 2000.
- Your next payment of---------- which is for May 2000, will be received on or about the second Wednesday of June 2000.

- After that you will receive ---------- on or about the second Wednesday of each month.
- These and any future payments will go to the financial institution you selected. Please let us know if you change your mailing address, so we can send you letters directly.

The day we make payments on this record is based on your date of birth.

Enclosure(s): Pub 05-10153

**522-527: •Exh-C Report of Dr. Goldstein, IME for Sentry**

MADISON AVENUE ORTHOPAEDIC ASSOCIATES, P.C..
Nate Bondi, M.D.
Robert S. Goldstein, M.D.
Edward M. Adler, M.D.
David S. Pereta, M.D.

124 Madison Avenue
New York, New York 10128
Tel (212) 427-3966
Fax (212) 997-5999

May 14, 1999

Sentry Life Insurance Company
P. O. BOX 8029
Stevens Point, Wisconsin 54481-8029
Attention: Ms. Diane Kranig

Re: PETER J. CORINES,
CLAIM: 90-12714-40 #191700
POLICY HOLDER: AMA, Office Overhead Expense

Dear Ms. Kranig:

The following is the independent orthopedic. examination on the above named claimant. The claimant is a 50 year old male who was examined in my office on May 14, 1999.

**HISTORY**

The claimant states that he is a general surgeon who developed low back pain while doing sit ups in May or June of 1998. He states that he developed severe pain in his low back with spasms. He also noticed a deformity developing in the center area of his low back. He states that he treated himself with bed rest and analgesics. He subsequently came under the care of Dr. Sydney Goldman, a physiatrist in Queens, New York. He states that x-rays were taken that revealed a Grade II spondylolisthesis of L4-L5. He subsequently had an MRI of the lumbar spine. The claimant states that he was never aware that he had a spondylolisthesis before. He states that he never had back pain, to speak of, prior to this incident. He states that he

EXHIBIT 2
INDEPENDENT MEDICAL EXAMINATION OF
INSURERS

worked long hours, operated and had a very busy surgical practice. He performed his surgery at an ambulatory center, as well as doing outpatient surgery at Roosevelt Hospital. He states that he stopped working due to pain in June of 1998.

**PAST MEDI CAL HISTORY:**

The claimant states that he had a cervical laminectomy for herniated discs, in 1996, by Dr. Russell Paterson. He states that he never had any injuries, accidents or trauma related to his low back. He was never treated for symptoms of low back pain.

**CHIEF COMPLAINT:**

The claimant states that he has constant pain in his low back on a daily awakening. The pain radiates to his left hip and down his left lower extremity to his left foot. He gets "pins

and needles" sensation on the lateral aspect of his left foot. He gets pain down his right side to his right hip area. He has increased pain with sitting and standing and can only stand for short periods of time.

He states that he does not drive and has someone drive him around. He states that he had not been treated by an orthopedic surgeon until one week ago. He states that one week ago, he saw Dr. Michael Neuwirth, an orthopedic surgeon, who recommended a spinal fusion because of motion of the L4-L5 spondylolisthesis. The claimant states that in the morning on arising, he gets into a hot bath, takes advil and Tylenol #4.

**X-RAY REVIEW:**

X-Rays of the lumbar spine, including flexion and extension views, performed on February 15, 1999, were reviewed
An MRI of the lumbosacral spine performed on February 15, 1999, was also reviewed.

**REVIEW OF RECORDS**
Photographic evidence of the claimant was obtained and continued photos included in the official records.
A report dated February 8, 1998, and signed by Dr. Sydney S. Goldman, M.D. , a physiatrist, was reviewed. Follow up reports dated August 25, 1998, and November 24, 1998, and November 25, 1998 were reviewed.

An MRI report of the lumbar spine performed at Empire MRI on October 13, 1998, was reviewed.

An MRI report of the cervical spine performed at Empire MRI on October 13, 1998, was reviewed.

**PHYSICAL EXAMINATION:**

The claimant is 6' tall and weighs 195 pounds. He was able to walk on his heels and toes. He was appropriately undressed for the examination.

Examination of the cervical spine revealed a 15 cm. midline surgical scar from within the hairline arid running distally. The scar was secondary to the cervical laminectomy. There was a mild defect of flexion extension, lateral rotation and lateral bending of the cervical spine. The muscles were supple. There was no spasm. There was no spasm palpable in the scapulocostal muscles. There was full range of motion of both upper extremities at the shoulders, elbows, wrists and fingers. The deep tendon reflexes in the biceps and triceps were equal bilaterally. Grip was equal and strong bilaterally.

There was no tenderness or palpation of the thoracic spine. On examination of the lumbar spine, there was spasm of the paravertebral muscles in the lower spine between L4 and S1. There was swelling noted over the L4 and L5 vertebrae. Straight leg raising was to 90 degrees in both the sitting and supine positions.

On standing erect, there was a defect of flexion. The claimant stated that at 40 degrees, there was pain in the low back. Extension was to 5 degrees and lateral bending was to 15 degrees. The deep tendon reflexes in the ankle jerk and knee jerk were equal bilaterally. There were no sensory or motor changes in the lower extremities.

Both thighs measured 47cms. The measurements were taken 10 centimeters above the superior pole of the patella. Both calves measured 39 cms.

**DIAGNOSIS:**

Spondylolisthesis L4-L5.

**DISCUSSION:**

It is my opinion that the claimant is impaired from performing the duties of a general surgeon, as he is unable to stand for periods of time or bend over the operating table. These restrictions are due to the spondylolisthesis in his lumbar spine, which appears to be unstable.

There does not appear to be any other physical impairments unrelated to his current complaints, which would hinder his ability to perform the activities of daily living.

I recommend, as did Dr. Michael Neuwirth, that surgery is indicated to correct the spondylolisthesis and unstable spine.

My objective findings revealed a deformity at the L4-L5 level posteriory in the back.

The Claimant is currently limited and restricted by the fact that he is unable to stand or sit, but for short periods of time. He has difficulty walking for more than two blocks without pain. The above limitations prevent him from performing his usual occupation as a general surgeon, which require him to stand and bend or assume positions for hours in the operating room, which cause pain in his low back.

The claimant's pain is mild to moderate. Spasm is mild to moderate. There were no abnormal reflexes. Although it was not evident to me, the claimant states that there were parethesias on the outer side of his left foot. There was no motor weakness or atrophy noted. There was a limitation of flexion of the lumbar spine to 40 degrees, extension to 5 degrees and lateral bending to 15 degrees. There was no apparent loss of coordination grip or dexterity. His limitations as to standing are to less than 30 minutes at a time, sitting is less than 30 minutes and walking is 2 to 3 blocks. He should not do any carrying , lifting, climbing or reaching.

In my opinion, the only treatment appropriate for the claimant is surgical intervention. His pain is daily and constant. He states that it lasts all day. Its severity is mild to moderate. Prolonged sitting, standing, walking and bending aggravate his condition. The pain is relieved with bed rest and Tylenol #4 (Codeine). The claimant's prognosis is poor without surgical intervention. He is a candidate for surgery.

In summary, it is my opinion that the claimant is totally disabled and not able to return to work in his usual occupation with restrictions, as his work entails prolonged standing.

Thank you for the opportunity of examining this claimant.

Very truly yours,

ROBERT S. GOLDSTEIN, M.D.

RS G/nab

I, Robert S. Goldstein, M.D. a physician authorized by law to practice in the State of New York, am not a party to the above entitled action, and hereby affirm that the foregoing statement is true, under the penalty-of perjury.

Dated: May 14, 1999

ROBERT S. GOLDSTEIN, M.D.
1245 Madison Avenue
New York, NewYork 10128
(212) 534-3644

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

- v. -

STIPULATION

PETER J. CORINES,

S1 02 Cr. 21 (GBD)

Defendant.

IT IS HEREBY STIPULATED AND AGREED by and between the United States of America, by James B. Comey, United States Attorney for the Southern District of New York, Andrew L. Fish, Assistant United States Attorney, of counsel, and Peter J. Corines, the defendant, by and through his attorneys, Benjamin Prafman, Esq., and Martin B. Adelman, Esq., that

1. Peter O. Corines purchased a $3,000 monthly disability insurance policy from the United States Life Insurance Company ("US Life"). This policy became effective in February 1986. US Life identified this policy as policy no. G180,955; certificate number GXMX 37003, Government Exhibit 14 is a copy of Corines's application for this policy and Government Exhibit 15 is a copy of the policy.

2. Peter J. Corines purchased an additional $4, 500 monthly disability insurance policy from. US Life. This policy became effective on December 15, 1997, US Life

identified this policy as policy no. g179,708; certificate number USD-10005.

EXHIBIT 3
PRE-TRIAL STIPULATIONS

Government Exhibit 17 is a copy of Corines's application for this policy and Government Exhibit 18 is a copy of the policy.

3. Peter J. Corines purchased an additional $2,500 monthly disability insurance policy from US Life. This policy became effective on February 1, 1998. US Life identified this policy as policy no. 5179,708; certificate number USD-10043.Government Exhibit 20 is a copy of Corinea's application for this policy and Government Exhibit 21 is a copy of the policy,

4. Government Exhibit 22 is a copy of a claim form received by US Life on November 3, 1998.

5. Government Exhibit 23 is a copy of a claim form received by US Life on November 5, 1998.

6. Government Exhibits 13, 16, and 19 are US Life Records relating to payments made on the $3,000 policy, the $4,500 policy, and the $2,500 policy respectively.

7. Government Exhibit 24 is a copy of a document received by US Life on December 7, 1998.

8. Government Exhibit 25 is a copy of documents US Life mailed together with an $18,000 check to Peter Corines in New York, New York, on or about January 13, 1999.

9. Government Exhibit 26 is a copy of documents US Life mailed together with a $27,000 check to Peter Corines in New York, New York, on or about January 13, 1999.

10. Government Exhibit 27 is a copy of documents US Life mailed together with a $15,000 check to Peter Corines in New York, New York, on or about January 13, 1999.

11. Government Exhibit 28 is a copy of a document US Life mailed together with a $3,000 check to Peter Cosines in New York, New York, on or about February 25, 1999.

12. Government Exhibit 29 is a copy of a document US Life mailed together with a $4,500 check to Peter Canines in New York, New York, on or about February 25, 1993.

13. Government Exhibit 19 shows that US Life mailed a $2,500 check to Peter Corines in New York, New York on or about February 25, 1999.

14. Government Exhibit 30 is a copy of a document received by US Life on March 22, 1999.

15. Government Exhibit 31 is a copy of a document received by US Life on January 4, 1999.

16. Government Exhibits 13,14, 15, 16, 17, 18, 19,20, 21; 22, 23, 25, 26, 27, 28, 29, 30, and 31 are from US Life's files and qualify as records of regularly conducted activity within the meaning of Federal Rule of Evidence 803(6).

IT IS FURTHER STIPULATED AND AGREED that and that Government Exhibits 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 26, 27, 26, 29, 30, and 31 and this stipulation are admissible in evidence at the trial of this case.

Dated: New York, New York
December 1, 2003

JAMES B. COMEY
United States Attorney
Southern District of New York

By;

Andrew L. Fish
Assistant United States Attorney

By:
Benjamin Brafman/Martin B. Adelman
Attorneys for Peter J. Corines

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

- v, -

STIPULATION

PETER J. CORINES, S1 02 Cr. 21 (GBD)

Defendant.

IT IS HEREBY STIPULATED AND AGREED by and between the United States of America, by dames B. Comey, United States Attorney for the Southern District of New York, Andrew L. Fish, Assistant United States Attorney, of counsel, and Peter J. Corines, the defendant, by and through his attorneys, Benjamin Erafman, Esq., and martin B. Adelman, Esq., that:

1. From 1986 through 1998, Peter 47, Corines had an American Medical Association sponsored office overhead insurance policy, under which he was insured for the expenses of his medical offices, including, among other things, rent and salaries in the event of his total disability. Government Exhibit 1 is a copy of the policy in effect in 1998. This policy was underwritten by Sentry Life Insurance Co. ('Sentry").

2. Government Exhibit .2 is a copy of a form titled Statement of Claim Total Disability, which Sentry received on or about November 3, 1998.

3. Government Exhibit 3 is a copy of a letter sent from Sentry to Peter J. Corines on November 5, 1998.

4. Government Exhibit 4 is a copy of a letter from

Feter J. Corines received by Sentry on or about November 19, 1998.

5. Government Exhibits 1, 2, 3, and 4 are from files and qualify as records of regularly conducted within the meaning of Federal Rule of Evidence 803.(6).

IT IS FURTHER STIPULATED AND AGREED that Government 1, 2, 3, and 4 and this stipulation are admissible in at the trial of this case.

Dated: New York, New York
December 1, 2003

JAMES B. COMEY
United States Attorney
Southern District of New York

By:
Andrew L. Fish
Assistant United States Attorney

By:
Benjamin Brafman/Martin B. Adelman
Attorneys for Peter J. Corines

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT CF NEW YORK

UNITED STATES OF AMERICA

- v. -

STIPULATION

PETER J. CORINES,

S1 02 Cr. 21 (GMD)

Defendant.

IT IS HEREBY STIPULATED AND AGREED by and between the United States of America, by James B. Carney, United States Attorney for the Southern District of New York, Andrew L. Fish, Assistant United States Attorney, of counsel, and Peter J. Corines, the defendant, by and through his attorneys, Benjamin Brafman, Esq. and Martin B. Adelman, Esq., that;

1. Peter J. Corines purchased a $10,000 monthly disability insurance policy from CNA. This policy became effective on February 1, 1998. Government Exhibit 5 is a copy of the CNA policy.

2. Government Exhibit 6 is a copy of the following documents from CNA's files: Peter J. Corines application for the $10,000 policy and a cover memo stating that the application was approved.

3. Government Exhibit 7 is a copy of the following documents from CNA's files; a letter mailed to Peter J. Corines on February 12, 1998, and a schedule of benefits.

4. Government Exhibit 8 is a copy of the following document from CNA's files; A claim from received on November 19,1998.

5. Government Exhibit 9 is a copy of the following document from CMA's files: A letter mailed from CNA to Peter Corines in New York, New York, on or about December 16, 1998, in connection with his disability insurance claim.

6. Government Exhibit 10 is a copy of the following document from CNA's files: A letter mailed from CNA to Peter Corines in New York, New York, on or about December 18, 1998, in connection with his disability insurance claim.

7. Government Exhibit 12 is a copy of the following document from MA's files: A letter and claim form received by CNA February 12, 1999.

8. Government Exhibits 5, 6, 7, 8, 9, 10 and 12 qualify as records of regularly conducted activity within the meaning of Federal Rule of Evidence 803(6).

IT IS FURTHER STIPULATED AND AGREED that and that Government Exhibits 5, 6, 7, 8, 9, 10 and 12 and this stipulation are admissible in evidence at the trial of this case.

Dated: New York, New York
December 1, 2003

JAMES B. COMEY
United States Attorney
Southern District of New York

By:
Andrew L. Fish
Assistant United States Attorney

By:
Benjamin Brafman/Martin B. Adelman
Attorneys for Peter J. Corines

# Investigative Options

3 Huntington Quadrangle, North Tower, 2nd. Floor, Melville New York, 11747

John Konefal
Investigator
Telephone 631-756-7544
880-732-9109 x7544
Facsimile 631-354-7522

August 9, 2000

To: File
Re: Dr. Peter Corines
Claim # 95-23851

Investigative Summary:
Respond to US Post Office, Manhattan New York. Conferral with Postal Inspector Chris Webber.

Investigation:

On this date I responded to the US Post Office in Manhattan New York to attend a meeting with Postal Inspector Chris Webber. Inspector Webber stated that he was aware that the sentencing of Dr. Corines was adjourned until October 25, 2000 for the same part location as before. He also informed me that he and an Investigator for the New York City Health and Human Resources Administration are actively reviewing all the medical records that were seized from Dr. Corines. He further assured me that US Attorney, Moy, is intending on indicting Dr. Corines in the fall of this year.

I will attend the sentencing of Dr. Corines on October 25, 2000 and advise of the Court decision.

JOHN F. KONEFAL

EXHIBIT 4
COMMUNICATIONS WITH AUSA MOY

**John F. Konefal Investigations**

178 Wilson Street
Garden City, NY 11530
Fax: 316 354 7522
Tel: 516 647 3683

March 28, 2001

To: File
Re: Claim # 9523851
Claimant-Dr. Peter Corines

Subject: Meeting with US Attorney Ping Moy

On March 23, 2001, I met with US Attorney Ping Moy at the Federal Building in Manhattan New York. He informed me that we will be presenting this matter to a Federal Grand jury within the month on April. We reviewed the file and he requested the following documents:

A complete copy of the file
The original, signed, application for insurance.
The original, signed, application for benefits.
A copy of the video surveillance tape of Dr. Corines
Originals of all taped interviews regarding this claim.

Attached to this memo is the invoice for the reproduction of the videotape of Dr. Corines. Please remit to the vendor.

The next meeting is scheduled for March 30, 2001, at the USA Office.

John F. Konefal

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

PETER J. CORINES,
Plaintiff pro se

06 cv 10219 (GBD)
MOTION FOR REARGUMENT AND RECONSIDERATION

-v-

UNITED STATES OF AMERICA,

Defendant.

PETER J. CORINES, Petitioner pro se, pursuant to Federal Rules of Civil Procedure 59(e), and 60(b), respectfully requests that the court reconsider its decision and order, dated December 27, 2006, and entered January 9, 2007, which dismissed petitioner's motion for relief under 28 USC 2255.

In its order denying Petitioner's motion, the Court states that the petition lacks facial validity and that petitioner has not made a substantial showing of the denial of a constitutional right. The court also states that petitioner waived his right to attack his conviction of direct appeal or collaterally.

These conclusions are not consistent with the issues raised in the petition, as several grounds have been raised which make a substantial showing of violation of petitioner's constitutional, and otherwise substantial rights.

Pursuant to rule I of the Rules Governing Section 2255 Proceedings for the United States District Courts, the scope of a 2255 motion includes, inter alia, (a) judgment that violates the Constitution or laws of the United States, (2) lack of jurisdiction of the court to enter the judgment, and (4) judgment or sentence otherwise subject to collateral review.

As cited by the court in its order, papers presented by a pro se litigant must be read liberally and interpreted to raise the strongest arguments that they suggest. However, the

Court has apparently misconstrued petitioner's motion, and its reasoning is, to say the least, too parsimonious.

Petitioner should be granted an opportunity to offer proof and arguments on the issues raised in the petition after notice is served upon the United States attorney. The issues raised are entitled to a hearing in accordance with Title 28 Section 2255, as was originally scheduled by the court when it first received petitioner's motion. The Court should not rule on the merits of the Grounds alleged, but ascertain that petitioner has raised issues of constitutional import, or otherwise cognizable under 28 U.S.C. sec. 2255.

The constitutional issues raised by petitioner which should preclude dismissal of his motion, include:

I. THE COURT WAS WITHOUT JURISDICTION BECAUSE INDICTMENT WAS FACIALLY INSUFFICIENT.

As cited by the Court on page two of its order, Ground 1 of petition states that the Court was without jurisdiction because the indictment, in counts four through eleven, did not state a cause of action in that it failed to properly allege the basic elements of the offense of mail fraud, specifically, a scheme to defraud which is consistent with the nature of the offense, and intent or specific intent to defraud.

The facial invalidity of the indictment alleging mail fraud' violated petitioner's rights under the Sixth Amendment guaranty that he must be informed of the nature and cause of the accusation; and failed to guaranty, as the Fifth Amendment guarantees, that the defendant has been indicted by a grand jury for the offenses for which the defendant is to be tried.

Footnote 1:
Counts 4-11 alleged mail fraud and were severed from counts 1-3.

Defense counsel was ineffective in failing to motion the court to quash this facially insufficient indictment, and in failing to apprise petitioner of its fatal flaws. A motion to dismiss the indictment should have been made.

II PETITIONER'S PLEA WAS CONSTITUTIONALLY INVALID.

Petitioner pleaded guilty to a facially invalid indictment. Therefore, his plea cannot be constitutionally valid.

There were several violations of F.R.Cr.P. Rule 11, which include the fact that petitioner was not informed of the true nature of the offense of either mail fraud or of the offense of conspiracy. He therefore could not have understood the elements of the offenses. The elements of the offenses of mail fraud (alleged in counts 4-11) and conspiracy (count one) were never explained by defense counsel, or by the court, at the time of plea allocution.

The court did not inquire of defense counsel as to whether he discussed the elements of the offenses with his client and defense counsel never stated that he did discuss these elements of either offense. Hence, Petitioner's plea could not have been intelligent, knowing and voluntary. It therefore violated his substantial rights. [2]

The elements of the offense were not admitted by petitioner, and a factual basis for the plea could not exist. Therefore, the plea should not have been accepted. McCarthy v. United States, 394 U.S. 459, 466 (1969); Manley v. United States, 432 F.2d 1241 (2nd Cir. 1970). This matter is properly subject to collateral review and is a violation of due process. It is a constitutionally required determination that a defendant's guilty plea be truly voluntary. McCarthy v. U.S. Ibid. at 465.

Footnote 2:

2 Petitioner's appeal was dismissed by the Appeals Court without written opinion. It stated that petitioner failed to show that his plea was not knowing and voluntary. 04-3538, U.S. Court of Appeals for the Second Circuit.

The failure of the Court to notify the defendant of and determine that the defendant understands terms of the plea-agreement provision waiving the right to collaterally attack the sentence, pursuant to Rule 11 (b)(1)(N), is a further violation of due process, subject to collateral review under 28 USC 2255. Clearly, petitioner would not have agreed to plead guilty if he understood what he was forfeiting when he was coerced by counsel to sign the plea agreement which waived the right collateral attack, as well as the right to appeal.

III DEFENSE COUNSEL WAS INEFFECTIVE

Defense counsel was ineffective in insisting that petitioner plead guilty to a facially invalid indictment, and in failing to inform petitioner of the real nature of the charges, that is, the elements required of the offenses of mail fraud(charged in counts 4-11, and conspiracy (charged in count one).

Defense counsel did not interview or prepare any witness or expert for trial. He showed a lack of knowledge of the government's position in stating that the prosecution was not claiming that petitioner was not disabled. This, of course, was not true, as the U.S. Attorney promptly confirmed in opening statements to the jury. It was clearly alleged in the indictment, although not true.[3]

Defense counsel's numerous stipulations deprived Petitioner of his right to confront witnesses and challenge the introduction of documents by the prosecution.

After failing to investigate and prepare adequately for trial, defense counsel found himself, on the second day of trial, without a strategy with which to continue. At that point, he insisted that petitioner plead guilty. He deceived petitioner by misrepresenting the true elements of the offense of mail

Footnote 3:
The Court, Prosecution, and Defense Counsel knew that Petitioner was affirmed disabled by the Social Security Administration, as well as by Insurance Company Physicians

fraud, and coerced petitioner to plead guilty to a defective indictment. He knew that petitioner was disabled as a matter of law, and could not, therefore, be guilty of the charged offense.

IV INEFFECTIVE ASSISTANCE OF COUNSEL PREJUDICED PETITIONER

Defense counsel pursued a flawed plan at the time of trial and had no strategy to continue after his plan failed. Thereupon, he coerced the petitioner to enter a plea. After weeks of purportedly preparing for trial, he abruptly changed course and deceived petitioner, insisting that he was guilty of mail fraud.

On the first day of trial, defense counsel represented to the court that the trial could be completed in one to two days. He prepared no witnesses, and stipulated to many items with the prosecution, thereby denying petitioner any opportunity to confront witnesses and challenge to the evidence presented. He did not plan to present any medical testimony.

Defense counsel misconstrued the prosecution's main argument, that petitioner was not disabled, despite the fact that it was repeatedly alleged in the (facially insufficient) indictment. He stated that "Disability is a term of art".

Clearly, Defense Counsel's actions were not within the standard expected of an experienced defense lawyer. He appeared only to desire rapid conclusion of the matter, showed not understanding of disability, and did not attempt to get expert advice.

In its decision and order, the court states (Order dismissing motion, page 2, footnote), that petitioner's new claim of ineffective assistance of counsel is "clearly without substantive merit," Yet this determination cannot be reasonably be made without an evidentiary hearing.

PROSECUTORIAL MISCONDUCT VIOLATED PETITIONER'S SUBSTANTIAL RIGHTS.

Whether or not the prosecution engaged in misconduct at the grand jury or during further prosecution in court cannot be determined without evidentiary hearing. Petitioner believes that the U.S. Attorney was aware of information that would have prevented the grand jury from voting to indict, yet withheld that information, and did not properly instruct the jurors on the elements of the offenses. False witnesses may also have been presented. These issues cannot be determined without judicial review. The prosecution should seek justice, not only conviction.

THIS COURT ORIGINALLY AGREED TO HEAR PETITIONER'S ARGUMENTS

It is to be noted that upon receipt of the motion, the court originally scheduled conference for January 11, 2007, and issued a scheduling order. Exhibit 1 through 6. The docket reflects that the matter was assigned to Magistrate Judge James C. Frances. The docket was subsequently altered to remove the order assigning the matter to Magistrate Judge Frances. Exhibit 2.

Petitioner received the pro se pretrial conference notice ordered by Justice Daniels, Exhibit 4, which instructed all parties to attend conference on January 11, 2007 at 9:30 a.m., and directing plaintiff to furnish all attorneys in this action with copies of the order an enclosures. The enclosures included the Civil Case Management Plan and Scheduling Order, Exhibit 5, which stated:

> "After consultation with counsel for the parties, the following Case Management Plan is adopted. This plan is also a scheduling order pursuant to Rules 16 and 26 (f) of the Federal Rules of Civil Procedure."

This order specified dates for the completion of discovery, dispositive motions, pretrial conference, and joint pretrial order, and also set a trial date. It set the next case

management conference date for June 7, 2007 at 9:30 a.m. Also included therewith, was a copy of the individual practices of Judge George B Daniels. Exhibit 6.

On January 9, 2007 the order denying Motion to Vacate (2255) was entered to the docket for petitioner's original case #02-cr-0021.

Petitioner's case challenges, inter alia, the validity of this court's prior determination under Rule 11 that a plea was made voluntarily and with understanding. This Court has dismissed the petition and denies a Certificate of Appealability (COA). On appeal, the matter may be subject to the appeal-limiting provisions to pending Section 2255 motions. See Lozada v United States, 107 F.3d 1011 (2d Cir. 1997). Hence, in dismissing petitioner's motion and denying a COA, the issue of collateral attack, based upon Rule 11 violations, may be eliminated by Appeals Court adherence to AEDPA. Hence, this court's action in dismissing the 2255 petition, which contains clear constitutional issues, could be construed as a veiled attempt to have the issue of Rule 11 violations removed from consideration by technical adherence to AEDPA. Lozada v United States, ibid .

As stated in Halliday v United States, 380 F. 2d 270: "..it is not unimportant that judicial decision-making not only be fair, but that it so appear to all eyes".

The application of fairness and justice demand that this court reconsider its decision and grant an evidentiary hearing in this matter. It appears from the Court's communications, that the matter has already been discussed with the U.S. Attorney. Exhibit 5.

Petitioner should be heard on all of the issues raised in his motion, as they conform to the scope of Rule 1- Section 2255 Proceedings. Petitioner has made a substantial showing of deprivation of his substantial and constitutional rights. Petitioner respectfully requests that this court amend its order and schedule a conference to address the factual and legal bases for all of the grounds raised in his motion for relief under 28 U.S.C. Section 2255.

Respectfully submitted:

Dated: January 18, 2007
Eastchester, New York

Peter J. Corines,
petitioner, pro se
249 Park Avenue
Eastchester, New York 10709
914 779 0539

U.S. District Court
Southern District of New York(Foley Square)
CIVIL DOCKET FOR CASE # 1:06-cv-10219-GBD

Corines v. United States of America
Assigned to Judge George B. Daniels
Cause 28:2255 Motion to Vacate/Correct Illegal Sentence

Date Filed 10/23/2006
Jury Demand: None
Nature of Suit: 510 Prisoner: Vacate Sentence
Jurisdiction: US Government Defendant

Petitioner

Peter J. Corines — Represented by Peter J. Corines
249 Park Avenue
Eastchester, NY 10709
PROSE

.v.

Respondent

The United States of America

| Date Filed | Docket Text |
|---|---|
| 10/23/2006 - 1 -Motion to vacate set aside or correct sentence (28 USC 2255). No Further Entries please see criminal case 02-cr-21-01 Document filed by Peter J. Corines Entered 10/26/2002 | |
| 10/23/2006 - Magistrate Judge James C. Francis is so designated Entered 101/26/2006 | |

| Date Filed | Docket Text |
|---|---|
| 10/23/2006 - 1 - Motion to vacate set aside or correct sentence | |
| 11/02/2006 - 2 - Pro se pretrial conference notice, Pretrial conference set for 1/11/2007 at 9:30 AM before Judge | |

George B. Daniels at the United States Courthouse, 500 Pearl Street, New York, New York Courtroom 15D bail pending appeal is DENIED, without prejudice to renewal following the Supreme Court's decision in Booker/Fanfan. Roseann B. Mackechnie, Clerk USCA Certified 9/14/04 (Entered 9/21/2004)
01/9/2007 - 60 - ORDER denying motion to vacate (2255) Peter J. Corines (1) Refer to 06 civ 10219 (Signed by George B. Daniels on 12/27/06, entered 1/09/2007

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Peter J. Corines,
Plaintiff, 06 cv10219 (GBD)
-against- PRO SE PRETRIAL CONFERENCE NOTICE
The United States of America,

Defendants.

GEORGE B. DANIELS, DISTRICT JUDGE:

Pro Se Plaintiff and counsel for all parties are hereby directed to attend a conference at the time and place fixed below, for the purpose of, Case Management and scheduling pursuant to Fed. R. Civ. P. 16. You are directed to furnish all attorneys n this action with copies of this order and enclosures, and to furnish chambers with a copy of any transmittal letter. If you are unaware of the identity of counsel for any of the parties, you must forthwith.send a copy of the notice and rules to that party personally.

A Pro Se pretrial conference will be held on Thursday, January 11, 2007 at - 9:30 a.m. at the United States District Courthouse, 500 Pearl Street, New York, Newark, COURTROOM 15D. If you are a prisoner in a state or city

facility, you should provide sufficient information for opposing counsel to prepare an order by this Court to arrange for a conference by telephone.

No application for adjournment will be considered unless made within one week the date of this notice,

All parties should also be prepared to address at the conference the factual and legal bases for their claims or defenses, any issue as to subject matter jurisdiction, and any other issue relevant to case management.

Entered: November 1, 2006 New York, New York

SO ORDERED:

EXHIBIT 4

George B. Daniels United States District Judge

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

Peter J. Corines,

Plaintiff, 06cv10219 (GBD)

- against - PRO SE PRETRIAL CONFERENCE NOTICE

United States of America

After consultation with counsel for the parties, the following Case Management Plan is adopted, This plan is also a scheduling order pursuant 'to Rules 16 arid 26(f) of the Federal Rules of Civil Procedure

1. No additional parties-may be joined after-April 5, 2007.
2. No amendment to the pleadings will be permitted after April 5, 2007.
3. Except for good cause shown, all discovery shall be commenced in time to be completed by July 5, 2007. The Court expects discovery to be completed within 90 days of the first scheduling conference unless, after the expiration of that 90 day period, all counsel stipulate that additional time (not to exceed 60 more days) is needed to completed discovery. In such event, discovery may be extended by the parties on

consent, without application to the Court, provided the parties are certain they can still meet the discovery completion date ordered by the Court. The discovery completion date shall not be adjourned except upon a showing of extraordinary circumstances.

4. Dispositive motions are to served by August 2, 2007. Answering papers are to be served within 14 days. Reply papers are to be served within seven (7) days. In the event a dispositive motion is made, the date for submitting the Joint Pretrial Order shall be changed from that shown herein to three(3) weeks from the decision on the motion. The final pretrial conference shall be adjourned to a date four (4) weeks from the decision on the motion.

5. A final pretrial conference will be held on September 6, 2007 at 9:30 a.m..

6. The Joint Pretrial Order shall be filed no later than August 9, 2007. The requirements for the pretrial order and other pretrial submissions shall be governed by the Court's Individual Rules of Practice.

7. All motions and applications shall be governed by the Court's Individual Rules of Practice.

EXHIBIT 5

May 1, 2001

INDIVIDUAL PRACTICES OF JUDGE GEORGE B. DANIELS

Unless otherwise ordered by Judge Daniels, matters before Judge Darnels shall be conducted in accordance with the following practices:

1. Communications With Chambers

A. Letters. Except as otherwise provided below, communications with chambers shall be by letter, with copies simultaneously delivered to all counsel. Copies of correspondence between counsel shall not be sent to the Court.

B. Telephone Calls. Except as provided in Paragraph 1 (D) below, telephone calls to chambers are permitted only in

emergency situations requiring immediate attention. In such situations only, call chambers at 212-805-6735.

C. Faxes. Faxes to chambers arc permitted only if copies are also simultaneously faxed or delivered to all counsel. No document longer than five (5) pages may be faxed without prior authorization. The fax number is 212-805-6737.

D. Docketing, Scheduling, and Calendar Matters. For docketing, scheduling and calendar matters, call Elizabeth Vega at 212-805-6735.

E. Requests for Adjournments or Extensions of Time. All requests for adjournments or extensions of time must be in writing and state (1) the original date, (2) the number of previous requests for adjournment or extension, (3) whether these previous requests were granted or denied, and (4) whether the adversary consents, and, if not, the, reasons given by the adversary for refusing to consent. If the requested adjournment or extension affects any other scheduled dates, a proposed Revised Scheduling Order (reflecting only business days) must be attached. If the request is for an adjournment of a court appearance, absent an emergency it shall be made at least 48 hours prior to the scheduled appearance. Emergency requests may be faxed to chambers.

2. Motions

A. Pre-Motion Conferences in Civil Cases. For discovery motions, follow Local Civil Rule 37.2. For motions other than discovery motions, pre-motion conferences are not required.

B. Courtesy Copies. Courtesy copies of pleadings, marked as such, shall be submitted to :chambers, as soon as practicable after filing.

EXHIBIT 6

C. Memoranda of Law. Unless prior permission has been granted, memoranda of law in support of and in opposition to motions are limited to 25 pages, and reply memoranda are limited to I0 pages. Memoranda of 10 pages or more shall contain a table of contents.

D. Filing of Motion Papers. Motion papers shall be tiled promptly after service.

E. Oral Argument on Motions. Parties may request oral argument by letter at the time their moving or opposing or

reply papers are filed. The court will determine whether argument will be heard and, if so, will advise counsel of the argument date.

3. Pretrial Procedures

A. Joint Pretrial Orders in Civil Cases. Unless otherwise ordered by the Court, within 30 days from the date for the completion of discovery in a civil case, the parties shall submit to the court for its approval a joint pretrial order, which shall include the following:

I. The full caption of the action.

The names, addresses (including firm names), and telephone and fax numbers of trial counsel.

A brief statement by plaintiff as to the basis of subject matter jurisdiction, and a brief statement by each other party as to the presence or absence of subject matter jurisdiction. Such statements shall include citations to all statutes retied on and relevant facts as to citizenship and jurisdictional amount.

iv. A brief summary by each party of the claims and defenses that party has asserted which

remain to be tried, without recital of evidentiary matter but including citations to all statutes relied on. Such summaries shall identify all claims and defenses previously asserted which are not to be tried.

v. A statement by each party as to whether the case is to be tried with or without a jury,

and the number of trial days needed.

vi A statement as to whether or not all parties have consented to trial of the case by a

magistrate judge (without identifying which parties have or have not so consented).

vii Any stipulations or agreed statements of fact or law which have been agreed to by

parties.

viii. A statement by each party as to the witnesses whose testimony is to be offered in its case in chief, indicating whether such witnesses will testify in person or by deposition.
ix. A designation by each party of deposition testimony to be offered in its case in chief with any cross-designations and objections by any other party.
x. A list by each party of exhibits to be offered in its case in chief, with one star indicating exhibits to which no party objects on grounds of authenticity, and two stars indicating exhibits to which no party objects on any ground

**B. Filings Prior to Trial in Civil Cases**. Unless otherwise ordered by th Court, each party shall file, 15 days before the date of commencement of trial if such a date has been fixed, or 30 days after the filing of the final pretrial order if no trial date has been fixed:
i. In jury cases, requests to charge and proposed voir dire questions when feasible,proposed jury charges should also be submitted on a 3.5" diskette WordPerfect version 5.1 or higher format;
ii. In nonjury cases, a statement of the elements of each claim or defense involving such party, together with a summary of the facts relied upon to establish each element;
iii. In all cases, motions addressing any evidentiary or other issues which should be resolved in limine; and
iv. In any case where such party believes it would be useful, a pretrial memorandum.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PETER J. CORINES,

Plaintiff,

-v-

06cv10219 (GBD)
ORDER

UNITED STATES OF AMERICA,

Defendant.

GEORGE B. DANIELS, District Judge:

*Pro se* petitioner Peter J. Corines's motion for reargument and reconsideration is denied.

Dated: January 22, 2007
New York, New York

SO ORDERED:
GEORGE B. DANIELS
United States District Judge

Petition Under 28 USC § 2255 to Vacate, set aside, or correct sentence by person in federal custody

UNITED STATES DISTRICT COURT/SOUTHERN DISTRICT

Movant: Peter J. Corines Case No: 02CR21-01

UNITED STATES OF AMERICA v. Peter J. Corines

Motion

1. Court Location: Southern District of New York
2. Date of Judgment of Conviction: June 9, 2004
3. Length of Sentence: 18 Months
4. Offense: 18 USC 371 - Conspiracy to commit health care fraud. 18 USC 1341 - Mail Fraud
5. Plea: Guilty
8. Appeal: Yes
9. Name of Court: Second Circuit Court of Appeals
   Result: Dismissed
   Date of Result: September 16, 2005
10. Other Motions: Yes
11. Court: U.S. Supreme Court
    Petition for Writ of Certiorari
    Grounds:
    I. Court of Appeals erred in dismissing appeal
    II. Crosby remand should have been granted
    III. District Court erred in denying motion to withdraw guilty plea
    IV. There was no factual basis for plea and it should not therefore have been accepted
    Evidentiary Hearing? No
    Result: Writ was denied
    Date: April 28, 2006
    Second Petition: U.S. Supreme Court, Petition for rehearing of denial of petition for writ of certiorari
    Grounds: I. False & flawed indictment, II Absence of factual basis for plea, III Appeal was dismissed in violation of due process.
    Result: Petition denied, June 19, 2006
    All avenue of appeals were exhausted
12. Alleged Constitutional Violations:
    (h) Denial of right of appeal

A. Ground One:

The trial court was without jurisdiction because indictment was false and flawed and did not state a cause of action.

The indictment, in counts four through eleven, states in paragraph 21,22,and 26 alleges that:"...Corines falsely represented that he was disabled". In truth and in fact, Petitioner was disabled as confirmed by the Social Security Administration and the physicians who examined Petitioner for the insurance companies. Prior to obtaining indictment, these facts were known to the prosecution.

The indictment failed to allege a scheme to defraud.

The indictment failed to allege intent to defraud.

B. Ground Two.

Guilty plea was not made intelligently with understanding of the true nature of the charges. A factual basis of the plea did not exist, and guilt could not exist of petitioner knew that he was disabled.

The plea proceeding was tainted by a failure of the court to engage in colloquy with the petitioner and determine whether the requisite element of intent existed. Petitioner was misled as to the elements of the offense. The Court's failure to ascertain the elements of the crime denied due process. Petitioner was not informed as to the provision in the plea agreement barring appellant from attacking his sentence collaterally.

C. Ground Three:

Petitioner's right to appeal his conviction was unconstitutionally dismissed. The decision of the second circuit Court of Appeals states that:

> "...the appellant knowingly and voluntarily waived his right to appeal and has not established that his plea was unknowing or involuntary."

As stated in Ground 2, the plea could not have been voluntary and intelligent because the elements of the offense did not exist, and Petitioner was not so informed at the time of the plea. The plea agreement did not waive the right of petitioner to appeal his conviction.

The US Attorney engaged in misconduct in pursuing

conviction when it knew that Petitioner was disabled as a mater,of law and could not be guilty of fraud. The Grand Jury could not have been informed of Petitioner's disability.

D. Ground Four:

The Court demonstrated that it did not comprehend the definition of disability and could not therefore impartially judge petitioner's case. The court stated in pre-trial proceedings that petitioner could not be disabled if he was able to perform some duties. This is not consistent with Federal or New York State Law.

E. Ground Five:

Defense counsel's performance was ineffective.

a. Defense counsel failed to interview any expert,physician or fact witness in preparation for trial.

b. Defense counsel failed to prepare any defense witnesses for trial including treating physicians, consultants, IME consultants, or insurance company doctors.

c. Defense counsel agreed to stipulate with prosecution to numerous facts without stipulating to numerous medical reports of treating physicians. The stipulations did not include defendant's medical reports.

d. Defense counsel made the inappropriate pretrial argument (transcript Dec. 1, 2003 page 6 - ) that the court should limit testimony to the time period June, 1998 through January, 1999, but that the court should allow defense to submit into evidence a medical report dated May, 1999. This report also was not included in stipulated items.

e. Defense counsel argued the government was not claiming that the defendant was not disabled when in fact the indictment did so allege.

f. Responding to the Court's inquiry, Defense counsel failed to present numerous documents witnesses and facts substantiating defendant's disability.

g. Defense counsel failed to move to dismiss the false and flawed indictment.

h. Defense counsel misled petitioner to believe that he was guilty and should enter plea.

13. Grounds not presented: Ineffective assistance of counsel was not presented. It is not reviewable on appeal.

15. Attorney representation:

At arraignment: Charles Ryans, Esq.,1674 Seventh Avenue NY, NY 10019

At trial: Benjamin Brafman, Esq., 767 Third Avenue NY, NY 10017

At sentencing: Clinton Calhoun, Esq., 81 Main Street, White Plains, NY 10601

On Appeal: Clinton Calhoun, Esq., 81 Main Street, White Plains, NY 10601

16. Sentenced on more than one count? Yes

17. Any future sentence? No

September 20, 2006

Signature of Movant

06 cv 10219 (GBD)
ORDER

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

PETER J. CORINES,
Plaintiff,
-v-
UNITED STATES OF AMERICA,
Defendant.

GEORGE B. DANIELS, District Judge:

Pro se petitioner, Peter J. Corines, is moving, pursuant to 28 U.S.C. § 2255, to vacate his sentence. The motion is denied..

Since petitioner is proceeding pro se, his pleadings are to be liberally construed and interpreted to raise the strongest argument they suggest. Haines v. Kerner, 404 U.S. 519, 520-21 (1972); McPherson v. Coombe, 174 F.3d 276, 280 (2d Cir. 1999) (quoting Burgos v. Hopkins, 14 F.3d 787, 790 (2d Cir. 1994)). Despite affording the pleadings a liberal reading, the petition cannot survive preliminary review for facial validity, under Rule 4 of the Rules governing Section 2255 proceedings in the United States District Courts.1

On December 2, 2003, the second day of a jury trial for eight counts of mail fraud, petitioner plead guilty to Counts One and Six of the superceding indictment pursuant to a written plea agreement with the government. On March 29, 2004, petitioner moved to withdraw his guilty plea. This Court denied that application. United States v. Corines, No. 02 Cr. 21 (GBD),

Footnote 1:
Rule 4(b) provides, in relevant part:
If it plainly appears from the motion, any attached exhibits, and the record of prior proceedings that the moving party is not entitled to relief, the judge must dismiss the motion and direct the clerk to notify the moving party. If the motion is not dismissed, the judge must order the United States attorney to file an answer, motion, or other response within a fixed time, or to take other action the judge may order.

04 WL 856315 (S.D.N.Y Apr. 20, 2004). On June 9, 2004, petitioner was sentenced by this Court to 18 months imprisonment and three years of supervised release. He was ordered to surrender for service of sentence at the institution designated by the Bureau of Prisons before 3:00pm on September 15, 2004. On June 14, 2004, petitioner filed notice of appeal of his conviction. The U.S. Court of Appeals for the Second Circuit dismissed his appeal on September 16, 2005, finding that the petitioner had "knowingly and voluntarily waived his right to appeal." His motion for rehearing en bane was denied on October 13, 2005. The U.S. Supreme Court denied his petition for a writ of certiorari on May 2, 2006.

In this motion, petitioner argues that the (1) "the trial court was without jurisdiction because indictment . . . did not state a cause of action;" (2) his guilty plea "was not made intelligently with understanding of the true nature of the charges;" (3) his "right to appeal his conviction was unconstitutionally dismissed;" (4) that this court "did not comprehend the definition of disability and could not therefore impartially judge petitioner's case;" and (5) "defense counsels' [sic] performance was ineffective."

Petitioner contends that only his claim for ineffective assistance of counsel was not raised on direct appeal of his conviction.2 Petitioner knowingly and voluntarily pled guilty pursuant to a written plea agreement with the government on the second day of his trial. As already noted by the Second Circuit Court of Appeals, petitioner, by the terms of his written plea agreement, waived his right to attack that conviction on direct appeal or collaterally.

Footnote 2:
Petitioner's new claim of ineffective assistance of counsel is clearly without substantive merit. Petitioner cannot demonstrate that (1) his "counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and (2) that he was prejudiced by his attorney's errors, i.e. that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," United States v. Eyman, 313 F.3d 741, 743 (2d Cir. 2002) (following Strickland v. Washington, 466 U.S. 668 (1984))(internal quotations omitted).

Accordingly, petitioner's motion is denied in its entirety and the petition is dismissed.

As the petitioner has not made a substantial showing of the denial of a constitutional right, a certificate of appealabilty will not issue. 28 U.S.C. § 2253; Tankleff v. Senkowski, 135 F.3d 235, 241 (2d Cir. 1998); United States v. Perez, 129 F.3d 255, 259-60 (2d Cir. 1997); Lozada v. United States, 107 F.3d 1011 (2d Cir. 1997). Additionally, the Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that any appeal from this Order would not be taken in good faith. Coppedge v. United States, 369 U.S. 438 (1962).

Dated: December 27, 2006
New York, New York

SO ORDERED:
GEORGE B. DANIELS
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

United States of America v. Peter Corines
Judgment in a Criminal Case
Case Number: S1 02 CR 21-01
USM Number: 51244-054

The Defendant pleaded guilty to counts One(1) and Six(6):

18 U.S.C. 371 - Conspiracy to commit Health Care Fraud and make false statements relating to health care fraud - Offense ended 1998: Count one
18 U.S.C. 1341 and 1342 - Mail fraud - Offense ended 1/13/99: Count six.
Counts 2-5, 7-11 are dismissed on motion of the United States.
Date of imposition of judgment: June 8, 2004
Judge: George B. Daniels

IMPRISONMENT

Eighteen (18) Months
The defendant shall surrender before 3 P.M. on September 15, 2004.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: Three(3) years

MONETARY PENALTIES

Assessment - $200
Restitution - $70,000

SCHEDULE OF PAYMENTS

Total assessment of $200 to be paid immediately
Restitution in the amount of $1000 payable to the clerk, US District Court for disbursements to U.S. Life to be paid immediately; Restitution in the amount of $69,000 shall be paid in monthly installments of $100 over a period of supervision to commence 30 days after date of the release from custody. The defendant shall notify the United States Attorney for this district within 30 days of any change of mailing or residence.

## STATEMENT OF REASONS

The Court adopts the presentence report and guideline applications without change.
Total level of offense: 15
Criminal History Category: i
Imprisonment Range: 18-24 months
Supervised Release Range: 2 to 3 years
Fine Range: $4,000 to $40,000
Restitution: $70,000
Defendant's Soc. Sec. No: 120-38-8989
Defendant's Date of Birth: July 5, 1948
Defendant's Residence: 249 Park Avenue,
Eastchester NY 10709
Defendant's mailing address: same as above
Date of imprisonment: 5/8/04
Judges Signature: George B. Daniels, USDJ
Date signed: July 9, 2004

# United States Court of Appeals
FOR THE
SECOND CIRCUIT

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At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, at Foley Square, in the City of New York, on the 16th day of September, two thousand five,

Present:

Hon. Joseph M. McLaughlin,
Hon. Jose A. Cabranes,
*Circuit Judges,*
Hon. Michael B. Mukasey,
*District Judge**

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United States of America,

Appellee,

v. 04-3538-cr

Peter Corines,

Defendant-Appellant.

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The appellant moves to remand the case to the district court to determine whether to resentence appellant. Upon due consideration, it is ORDERED that the motion is DENIED and the appeal is DISMISSED, because the appellant knowingly and voluntarily waived his right to appeal and has not established that his plea was unknowingly or involuntary. See United States v. Morgan, 406F.3d135,137 (2d Cir.2005)("[the defendant's] inability to foresee that subsequently decided cases would create new appeal issues, does not supply a basis for failing to enforce an appeal waiver"); United States v. Haynes, 412F.3d37(2d Cir. 2005)(although the defendant had not sought to vacate his plea, he would not have succeeded in such a claim because the plea allocution demonstrated that the defendant "ha[d] been

fully informed, competent, free of coercion, and cognizant of his rights at the time of the plea"). Appellant's motion for bail pending appeal and to file an addendum to his *pro se* brief and appendix are DENIED.

FOR THE COURT:
Roseann B. MacKechnie, Clerk

By: Lucille Carr

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*The Honorable Michael B. Mukasey, Chief Judge of the United States District Court of the Southern District, sitting by designation.